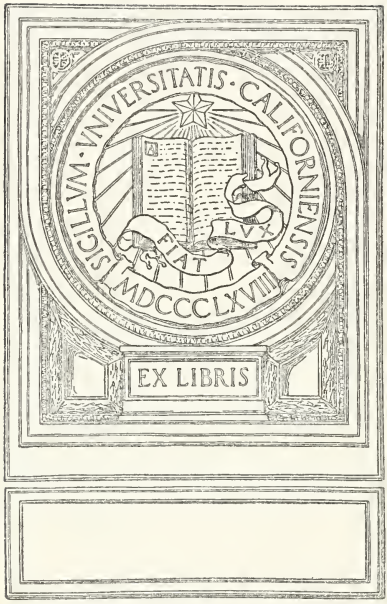
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BULLETIN OF THE UNIVERSITY OF WISCONSIN

NO. 269

ECONOMICS AND POLITICAL SCIENCE SERIES, VOL. 4, NO. 3, PP. 317-427

INDIRECT CENTRAL ADMINISTRATION OF WISCONSIN

BY

JAMES DUFF BARNETT

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY,
THE UNIVERSITY OF WISCONSIN,
1905

Published bi-monthly by authority of law with the approval of the Regents of the University and entered as second-class matter at the post office at Madison, Wisconsin

MADISON, WISCONSIN
DECEMBER, 1908

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PREFACE.

The central administration of the state consists of two great divisions: that which directly accomplishes the purposes of government, whether protective or developmental—which may be termed the direct administration; and that which does not directly accomplish these purposes, but whose activity is essential to the organization or operation of the protective and developmental branches of the administration—which may be termed the indirect administration. These divisions have not in practice been made mutually exclusive, and hence it is that although the indirect administration alone is the proper subject of this history, it will at times be necessary to discuss functions of direct administration when performed by the division with which we are here chiefly concerned. For a similar reason some functions other than administrative must also be considered. Although the militia belongs to the protective branch of the direct administration, it is so associated with the office of governor that it would be a proper subject for discussion in this connection; but there is such a distinction between civil and military administration that it has seemed best here to omit all reference whatever to the latter.

The general functions peculiar to the indirect administration are for the most part essentially the same at present as they were under the territorial government, and not many radical changes have been made in the organization by which these functions have been performed. Indeed, only two additional departments have been established for the purpose since the early years of the state. This is in great contrast with the remarkable development of function and organization of the direct administration, especially on its protective side. During our early history departments now classed with the indirect ad-

ministration constituted almost the whole of the central executive government, and as the state assumed new functions these usually were performed by the departments already established; but with the further development of the state and the consequent increase of the business of these departments, a differentiation of work has been going on, with the result that these departments have gradually been relieved, for the most part, of the functions of direct administration, which, with additional functions assumed by the state, have generally been put in charge of departments established especially for the purpose.

For suggestions and criticisms thanks are due to Professor Paul S. Reinsch and Professor S. E. Sparling of the University of Wisconsin, and Professor B. F. Shambaugh of the University of Iowa.

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I. The Organization of the Office of Governor

The governor of the territory of Wisconsin was appointed by the president of the United States with the consent of the senate.[1] At times there was agitation in the territory to have the office made elective, especially in 1843 after the conflict between the governor and the legislative assembly.[2] Under the con-

[1] *Organic Law* (*Act of Congress*, Apr. 20, 1836, 5 *Stat. L.* 10), sec. 2.

[2] *Miner's Free Press*, Oct. 1, 1839; *Wisconsin Enquirer*, Feb. 8, 1840; Apr. 30, 1842; *Council Journal*, 1842-3, p. 353; *Wisconsin Democrat*, Feb. 21, 1843. See below, p. 26.

stitution of the state he is elected by the people; but should there be no election on account of a tie vote, the election is made by a joint ballot of the two houses of the legislature at their next regular session.[3] The president was expressly empowered to remove the territorial governor,[4] while the state constitution makes the governor removable by impeachment.[5]

The office has never been filled by special election, but in case of vacancy the duties of the office have devolved, during the territorial period, upon the secretary of the territory, and under the constitution, upon the lieutenant governor, or when there is no lieutenant governor, upon the secretary of state.[6] The governor's term was three years during the territorial period.[7] In the constitutional convention a strong effort was made to reduce the term to one year,[8] but it was finally fixed at two years.[9]

The governor of the territory received a salary of twenty-five hundred dollars as governor and superintendent of Indian affairs.[10] In the constitutional convention it was maintained that the governor, whose duties would probably be light, might devote a large part of his time to his private business; and the original proposition to make the salary fifteen hundred dollars was amended to make it twelve hundred and fifty dollars.[11] In 1861 the governor urged an increase in the salary of his successors, saying that otherwise none but men of wealth would be eligible to the office on account of the expense due to the position.[12] But no increase was made until eight years afterwards, when a constitutional amendment fixed the salary at five thousand dollars.[13] For some years previous to this increase, however, and apparently for some time later, the governor's "contingent

[3] *Constitution*, Art. V, sec. 3.
[4] *Organic Law*, sec. 2.
[5] *Constitution*, Art. VII, sec. 1.
[6] *Below*, pp. 36–7.
[7] *Organic Law*, sec. 2.
[8] *Wisconsin Argus*, Dec. 28, 1847; *Journal of Constitutional Convention*, 1847–8, p. 73.
[9] *Constitution*, Art. V sec. 1.
[10] *Organic Law*, sec. 11. See *Congressional Globe*, **3**: 340.
[11] *Wisconsin Argus*, Dec. 28, 1847; *Journal of Constitutional Convention*, 1847–8, pp. 71, 74–5; *Constitution*, Art. V, sec. 5.
[12] *Governor's Message*, 1861, p. 17. See also *Weekly Wisconsin Patriot*, Feb. 7, 1858.
[13] *Constitution*, Art. V, sec. 5.

fund'' was regarded as having been created, for the most part at least, for his private use.[14] An ''executive residence'' was provided in 1885,[15] a measure advocated as early as 1858 on account of the inadequacy of the governor's salary.[16] The amendment of 1869 provides that the salary shall be ''in full for all traveling and other expenses incident to his duties.''[17]

The governor has generally had a very free hand in the appointment and compensation of the subordinates in his office. Prior to 1854 no special permanent provision was made by law in regard to the clerical force in the governor's office. Although appropriations had previously been made for the services of his private secretary,[18] it is only since that year that the law has formally recognized this position and fixed the salary.[19] During much of the time both before and after this date there have been no provisions of law for the clerks of the office other than the ''contingent funds'' in the governor's control.[20] For a few years after the legislature permanently provided for the private secretary, the governor was allowed no other clerical assistance.[21] But from 1861 to 1878, within a maximum expenditure, the number of clerkships and their compensation were controlled by the governor,[22] and again since 1897, when the number and compensation of most of the other state officers were fixed by law, the governor has been expressly authorized to use his discretion in determining the number of clerks to be appointed in addition to the few provided for by law, and in fixing their compensation.[23] The restrictions of the recent civil service law apply to none of the governor's appointments.[24]

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[14] *Madison Daily Democrat*, Oct. 15, 1869; *Wisconsin State Journal*, Oct. 29, 1869; *Senate Journal*, 1877, pp. 38–9.

[15] *Laws*, 1885, ch. 324. Fuel, light, furniture, carpets, etc. are also furnished by the state, without any express authority of law. *Senate Journal*, 1901, p. 55.

[16] *Assembly Journal*, 1858, p. 2107; *Wisconsin State Journal*, Feb. 26, 1885.

[17] *Constitution*, Art. V, sec. 5. See *below* pp. 37–8 and notes.

[18] *Laws*, 1845, p. 61, sec. 1; *Revised Statutes*, 1849, ch. 9, sec. 8.

[19] *Laws*, 1854, ch. 71, secs. 1–2; *Revised Statutes*, 1858, ch. 10, sec. 8; *Revised Statutes*, 1898, secs. 129, 170.

[20] *Laws*, June, 1848, p. 184.

[21] *Laws*, 1854, ch. 71, sec. 2.

[22] *Laws*, 1861, special session, ch. 3; *Revised Statutes*, 1878, sec. 4978.

[23] *Laws*, 1897, ch. 355; *Laws*, 1901, ch. 419. See also *Laws*, 1880, ch. 257; *Revised Statutes*, 1898, sec. 129.

[24] *Below* p. 107.

The organic law of the territory provided for annual appropriations to be made by congress as a fund to be expended by the governor for the contingent expenses of the territory;[25] and since the state was organized such appropriations, part of the time permanent, have generally been made at each regular session of the legislature.[26] No account was required of the governor for his expenditure of the congressional appropriations, but until 1857 he was required to account for the appropriations made by the legislature.[27] From that time until 1878 accounts were usually not required. A committee of the legislature recommended, in 1877, that such accounts be required in order to prevent the governors diverting these funds to their own use,[28] and this requirement was made the next year.[29] The governor has seldom been required to make any report of appropriations made to him at various times to be expended for special purposes.

II. The Administrative Functions of the Governor

By both the organic law of the territory and the constitution of the state "the executive power" is vested in the governor, and it is required that he "shall take care that the laws be faithfully executed."[30] At the time the constitution was adopted it seems to have been the prevalent opinion that the governor would have, and should have, very few duties to perform.[31]

1. ADMINISTRATIVE CONTROL

Appointments.—The governor of the territory was empowered, with the consent of the council, to appoint "all civil officers" not otherwise provided for in the organic law.[32] Beginning with

[25] Sec. 11.
[26] *E. g., Laws,* June, 1848, p. 184; *Laws,* 1907, ch. 89.
[27] *Revised Statutes,* 1849, ch. 9, sec. 8; *Laws,* 1857, p. 161 (No. 86); *Senate Journal,* 1858, pp. 1339-45.
[28] *Senate Journal,* 1877, pp. 37-53.
[29] *Revised Statutes,* 1878, sec. 137; *Revised Statutes,* 1898, sec. 137.
[30] *Organic Law,* sec. 2; *Constitution,* Art. V, secs. 1, 4.
[31] *Wisconsin Argus,* Dec. 28, 1847.
[32] *Organic Law,* sec. 7.

1841, the governor protested against those instances in which the legislative assembly had "attempted to assume this power,"[33] but the supreme court of the territory, in *United States v. Hatch*,[34] held that the term "civil officers" here used embraces only "such officers as in whom part of the sovereignty or municipal regulations, or general interests of society are vested," thus excluding officers dealing with "matters of temporary and local concern," such as the canal commissioners involved in this case, appointed by the assembly.

Although in the constitutional convention there was some contention that the governor should be divested entirely of the appointing power, or at least much limited,[35] the constitution leaves the manner of the election or appointment of the officers not provided for in the constitution to the discretion of the legislature.[36]

A review of the methods by which the various members of the permanent state administration have been chosen indicates that with very rare exceptions election by the people has been confined, by the constitution or statutes, to a few of the most important state offices, and that a state board (except when composed of *ex officio* members) has never been so elected; that appointments have very seldom been made by the legislature and no such appointments have been made for over thirty years; that of the remaining offices the state boards, until within the last thirty years appointed by the governor alone, during the succeeding period have been appointed by the governor alone, the governor with the consent of the senate (the most important cases), in a few recent instances by the governor upon the recommendation of other officers or of a private association,[37] or, in one

[33] *House Journal*, 1841–2, pp. 10, 26; *Council Journal*, 1841–2, pp. 404–6; *Council Journal*, 1842–3, pp. 153–5, 335–6; *House Journal*, 1843–4, p. 323; *Wisconsin Enquirer*, Dec. 20, 1841; *Madison Express*, Feb. 12, 1842.

[34] 1 *Pinney*, 182, 190 (1842).

[35] *Wisconsin Argus*, Dec. 28, 1847.

[36] *Constitution*, Art. XIII, sec. 9.

[37] *E. g., Laws*, 1882, ch. 167, sec. 5; *Laws*, 1907, st. 1409 b. Before appointing members of the state grain and warehouse commission, the governor must request the recommendation of persons for appointment from the governors of North Dakota and New York and from the board of trade of Superior, "which said recommendations shall be taken into consideration by the governor in appointing such commissioners, but he shall not be confined to the persons so recommended in appointing such commissioners." *Laws*, 1905, ch. 19, sec. 2.

instance, by the state superintendent,[38] and, in another, by the supreme court;[39] and that while throughout the history of the state the most of the offices other than boards have been filled by appointment by the governor, the proportion of such offices for appointment to which the consent of the senate is necessary has increased, and that the recommendation of another officer or of a private association has been substituted for the consent of the senate in a few appointments.[40] In a very few instances the governor has made appointments to subordinate offices of the administration.[41]

The temporary boards and other temporary offices were filled during the territorial period almost invariably by appointments made by the legislative assembly, but since 1848 the legislature has seldom made such appointments except in the case of "state road commissions," the appointments being made usually by the governor alone, or, in a few instances, by the governor and senate.

The circuit judges of the territory (*ex officio* justices of the supreme court) were appointed by the president of the United States with the consent of the senate.[42] At the time the constitution was adopted there was a decided difference of opinion as to whether the judges should be appointed by the governor or elected by the people,[43] but the question was settled in favor of popular election.[44] The supreme court commissioners, masters in chancery, and notaries public of the territory, were appointed by the governor and council.[45] When the state was organized the office of master in chancery was abolished, court commissioners were made appointive by the circuit court, and notaries public

[38] *Laws*, 1868, ch. 169, sec. 2; *Revised Statutes*, 1898, sec. 454.

[39] *Laws*, 1885, ch. 63, sec. 2; *Laws*, 1903, ch. 19, sec. 3.

[40] *E. g.*, *Laws*, 1903, ch. 434, sec. 2; *Laws*, 1907, st. 926 (162); *Laws*, 1897, ch. 150, sec. 1; *Revised Statutes*, 1898, sec. 1494f.

[41] *E. g.*, *Laws*, 1897, ch. 355; *Laws*, 1901, ch. 418, sec. 4.

[42] *Organic Law*, sec. 11.

[43] *Wisconsin Argus*, June 16, 23, July 7, 14, 21, 1846; Jan. 5, June 22, 1847; *Journal of Constitutional Convention*, 1846, pp. 106–13.

[44] *Constitution*, Art. VII, secs. 4, 7.

[45] *Organic Law*, secs. 7, 12; *Michigan Laws Condensed*, 1833, pp. 188, 214, 244; *Laws* 1837–8, No. 58[2]; Resolution, No. 20, (7, 10); *Statutes*, 1839, pp. 85, 94–5, 97.

by the governor alone.[46] With the exception of the notaries public the only state officers of a judicial nature whose original appointment is now made by the governor are the commissioners for taking acknowledgments in other states, provided for in 1848,[47] and two members of the state board of arbitration, established in 1895. The third member of this board is appointed upon the recommendation of the other two, but in case of their disagreement by the governor alone.[48]

In accordance with the original requirements of the organic law of the territory, the offices of sheriff, judge of probate, justice of the peace, district attorney, public administrator, and auctioneer, were filled by appointment by the governor and council.[49] It seems that the office of district surveyor was filled in the same way until 1839,[50] when, contrary to the organic law, by statute it was made elective.[51] But apparently from the organization of the territory until 1841 the governor, as a concession to the doctrine of local self-government, made all nominations for these local offices upon recommendation of the members of the legislative assembly representing the different counties.[52] When this practice was discontinued, the agitation, which had already begun, to have the local offices made elective increased,[53] with the result that in 1843 an act of congress authorized the assembly to provide for filling the offices of sheriff, judge of probate, justice of the peace, and county surveyor by either election or appointment.[54] Whereupon the legislative assembly made all these

[46] *Constitution,* Art. VII, sec. 19.. *Laws,* June, 1848, p. 112, sec. 1; *Revised Statutes,* 1849, ch. 10, sec. 75; *Revised Statutes,* 1898, sec. 173; *Laws,* 1905, ch. 254.

[47] *Laws,* June, 1848, p. 55, sec. 1; *Laws,* 1905, ch. 201.

[48] *Laws,* 1895, ch. 364, sec. 1; *Revised Statutes,* sec. 1729b.

[49] *Organic Law,* secs. 7, 12; *Michigan Laws Condensed,* 1833, p. 83, sec. 1; p. 229, sec. 1; p. 538, sec. 1; *Laws,* 1836, No. 4; *Laws,* 1837–8, No. 83, sec. 1; Resolution, No. 20 (95), sec. 1; *Statutes,* 1839, p. 55, sec. 1; p. 94, sec. 2.

[50] *Organic Law,* secs. 7, 12; *Michigan Laws Condensed,* 1833, p. 536, sec. 1; *Laws,* 1837–8, Resolution, No. 20 (94).

[51] *Statutes,* 1839, p. 99, sec. 1.

[52] *Council Journal,* 1840–1, pp. 10–1; *Wisconsin Enquirer,* Dec. 27, 1841.

[53] *Council Journal,* 1840–1, pp. 10–11; *House Journal,* 1840–1, pp. 109–10; *House Journal,* 1842–3, p. 80.

[54] *Act of Congress,* Mar. 3, 1843, ch. 99, sec. 1, 5 *Stat. L.* 630. A law of the next year required the *election* of justices of the peace. *Act of Congress,* June 15, 1844, ch. 69, sec. 2, 5 *Stat. L.* 670.

offices elective,[55] and abolished the office of district attorney.[56] The offices of auctioneer and administrator continued only to 1848 and 1849 respectively.[57] The governor's power of original appointment to local offices was thus reduced to almost nothing by the end of the territorial period.

All such appointments by the central administration would seem to have been removed by the constitution in 1848,[58] but since the establishment of the county insane asylums in 1878 the governor has, during most of the time, appointed some or all of the local trustees;[59] and at times upon the organization of a new county the first local officers have been appointed by the governor.[60] However, in 1883 the supreme court suggested, but did not decide, that such temporary appointments in the counties are unconstitutional.[61] The first appointments of the west side park commission of Milwaukee in 1875 were made by the legislature,[62] apparently the only instance where a municipal office has been so filled.[63]

During the territorial period vacancies in offices to which the original appointments were made by the governor and council, were filled, during the recess of the council, by the governor until the end of the next session of the assembly.[64]

The governor of the state exercises a great deal of power through his authority to appoint to vacancies in offices, to many of which he makes no original appointment. The *Revised Statutes* of 1849 direct that whenever a vacancy occurs, during the

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[55] *Laws*, 1842-3, p. 9, secs. 3-4, 6, 8, 13.

[56] *Laws*, 1842-3, p. 28.

[57] *Laws*, June, 1848, p. 49; *Revised Statutes*, 1849, ch. 157.

[58] *Constitution*, Art. XIII, sec. 9.

[59] *Laws*, 1878, ch. 298, sec. 4; *Laws*, 1881, ch. 233, sec. 7; *Laws*, 1887, ch. 138; *Laws*, 1899, ch. 263, sec. 1; *Laws*, 1905, ch. 141.

[60] *E. g., Laws*, 1864, ch. 74, sec. 4; *Laws*, 1901, ch. 469, sec. 3.

[61] *Chicago & Northwestern Ry. Co. v. Langlade Co.*, 56 *Wis.* 614, 625 (1883).

[62] *Laws*, 1875, ch. 298, secs. 1-2.

[63] A law of 1881 provides that whenever the governor is authorized to make any appointment to office with the consent of the senate, and the legislature is not in session at the time the office should be filled, the governor may make the appointment subject to the approval of the senate at the next session. *Laws*, 1881, ch. 307; *Revised Statutes*, 1898, sec. 137a. *Cf. Report of Attorney General*, 1901-2, p. 89. In 1844 the governor's right to re-appoint, after the adjournment of the legislative assembly, a person appointed by him but rejected by the council, was questioned. *Wisconsin Democrat*, Feb. 22, 1844.

[64] *Organic Law*, sec. 7.

recess of the legislature, in an office which the legislature, or the governor with the consent of the senate, is authorized to fill by appointment, the governor, unless it is otherwise provided, may make the appointment for the time being.[65] No such general provisions have ever been made for vacancies in the elective state offices or in the offices to which the original appointments are made by the governor alone. In the few cases where the original appointments have been made by the legislature, some of the vacancies have been filled by the governor. When the governor and the senate make the original appointment, sometimes the vacant office is filled in the same way, and sometimes by the governor alone. Whenever provision has been made for filling vacancies in the elective offices of the state administration (at present in all cases, although often no provision whatever has been made until long after the creation of the office) the governor alone has made the appointments,[66] but the governor has been free to choose between appointment and calling a special election.[67] Further, the governor is generally expressly authorized to fill vacancies in the offices to which he makes the original appointment, although in some instances there is no express provision made for such cases. The constitution directs that all vacancies in the supreme and circuit courts shall be filled by the governor.[68]

When the governor's power of original appointment to county offices was restricted in 1843 by making certain offices elective,[69] he retained the power to appoint to vacancies in the office of probate judge, and in this case the consent of the council was not required.[70] Three years later a statute provided in the same

[65] *Revised Statutes,* 1849, ch. 11, sec. 12; *Revised Statutes,* 1898, sec. 966.

[66] Should a member of the board of state canvassers be disqualified for sitting at a particular canvass, his place is filled by temporary appointment by the chief justice of the supreme court. *Below,* p. 96.

[67] *Revised Statutes,* 1849, ch. 6, sec. 4; *Revised Statutes,* 1898, sec. 94m and note. 1848-9, some of these offices were filled only by special election. *Laws,* June, 1848, tit. 2, sec. 3.

[68] *Constitution,* Art. VII, sec. 9. See *State v. Messmore,* 14 *Wis.* 163 (1861). Since 1877 vacancies in a circuit court have been filled by the governor's designation of a judge in another circuit to act in the vacant circuit. *Laws,* 1877, ch. 75; *Revised Statutes,* 1898, sec. 2432. *Cf. Statutes,* 1839, p. 199, sec. 3.

[69] *Above,* pp. 15-16.

[70] *Laws,* 1842-3, p. 9, secs. 13, 16, 18.

manner for vacancies in the office of sheriff.[71] The constitution might seem to have taken all power of appointment to vacancies in county offices as well as original appointments from the central administration,[72] but it has not been so strictly interpreted. The law of 1849 providing that whenever in the office of judge of probate, register of deeds, district attorney, sheriff, or coroner there is "no officer duly authorized to execute the duties thereof," the governor may make an appointment for the time being,[73] was declared to be valid by the supreme court,[74] although the constitution provided for special elections to fill vacancies in all these cases except that of judge of probate, and did not confer the power of appointment upon the governor in any case. But the fact that special elections to fill vacancies occurring within thirty days of a general election have been prohibited by statute did not necessarily allow the governor to fill such vacancies, since in some cases the duties of the vacant office devolved upon some other officer, "the law itself filling the vacancy,"[75] or the vacancy might be filled by another authority. A law of 1859 remedied this condition so far as the office of sheriff was concerned by authorizing the governor to fill the vacancy,[76] and in 1864 this provision was extended to include also the offices of register of deeds, district attorney, and coroner.[77] It had already been provided in 1859 that a vacancy in the office of county judge (judge of probate) might be filled either by the governor's appointment or by special election at the discretion of the governor,[78] but a law of 1867 made appointment by the governor the only method.[79] Finally, by the terms of an amendment to the constitution ratified in 1882, a vacancy in any of these offices is filled by appointment alone.[80]

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[71] *Laws*, 1846, p. 26, sec. 2.

[72] *Constitution*, Art. VI, sec. 4.

[73] *Revised Statutes*, 1849, ch. 11, sec. 13.

[74] *Sprague v. Brown*, 40 *Wis.* 612, 618, (1876).

[75] *Wisconsin Weekly Patriot*, Feb. 5, 1859; *Senate Journal*, 1859, pp. 20–1.

[76] *Laws*, 1859, ch. 72, sec. 1.

[77] *Laws*, 1864, ch. 90 sec. 2; *Revised Statutes*, 1898, sec. 967.

[78] *Laws*, 1859, ch. 60; *State v. Washburn*, 17 *Wis.* 658, 664, (1864).

[79] *Laws*, 1867, ch. 70, sec. 3; *Laws*, 1907, st. 2441. For special laws authorizing the governor to appoint to vacancies in the office of municipal judge, see, *e. g.*, *Laws*, 1880, ch. 48, sec. 2; *Laws*, 1895, ch. 24, sec. 4.

[80] *Constitution*, Art. VI, sec. 4.

The only other local offices in which vacancies are not now filled by local authorities are the office of county superintendent, to which appointment in case of a vacancy has always been made by the state superintendent,[81] and the office of county supervisor of assessments in which "vacancies" caused by failure of the local authorities to appoint are filled by the tax commission.[82]

Removals.[83]—There was no express provision in the organic law of the territory for removals from office by the governor, but such power, although not uncontested, was assumed, doubtless, on the ground of the power of appointment.[84]

The statutes of 1849 provide that all officers except collectors and receivers of public moneys, appointed by the governor and senate or by the legislature, "may, for official misconduct, or habitual or wilful neglect of duty, be removed by the governor upon satisfactory proofs, at any time during the recess of the legislature;" that all officers appointed by the governor for a certain time or to supply a vacancy (the constitution makes all judges, as other "civil officers" removable by impeachment, and judges of the supreme and circuit courts removable also by address; and the *Revised Statutes* of 1878 expressly exempt all judges from removal by the governor[85]) may be removed by him; that any collector or receiver of public moneys appointed by the governor, the governor and senate, or the legislature, unless otherwise provided by law, may be removed by the governor, "in case it shall appear to him on sufficient proofs that such collector or receiver has in any particular wilfully violated his duty;" and that officers appointed by the legislature alone may be removed by the legislature.[86] But there is no general provision for the re-

[81] *Laws.* 1867, ch. 111, sec. 10; *Revised Statutes,* 1898, sec. 967.

[82] *Below,* p. 82.

[83] Notice an attempt of the council in 1841 to check the governor's power of removal by a review of his action (*Council Journal,* 1841-2, pp. 518-22), and a similar proceeding in the assembly in 1855. *Assembly Journal,* 1855, pp. 266-9.

[84] *Wisconsin Enquirer,* Sep. 8, 1841, Apr. 30, May 4, 1842; *Madison Express,* Feb. 12, 1842; *House Journal,* 1842-3, p. 428.

[85] *Constitution,* Art. VII, secs. 1, 13; *Revised Statutes,* 1878, sec. 971; *Revised Statutes,* 1898, sec. 971.

[86] *Revised Statutes,* 1849, ch. 11, secs. 7-10; *Revised Statutes,* 1898, secs. 769-72.

moval of elective state officers, except by impeachment,[87] a fact which was asserted as an objection at the time the constitution was adopted.[88]

A number of the provisions in regard to removals from particular offices may be mentioned. Some officers appointed by the governor have served "during the pleasure of the governor,"[89] or at the governor's "discretion,"[90] or have been removable "when he shall believe that the best interests of the state demand such removal,"[91] or "for cause,"[92] or "upon reasonable notice,"[93] or "for inefficiency, neglect of duty, or malfeasance in office."[94] A few officers appointed by the governor and senate,[95] or by the legislature[96] have been removable by the governor alone. For a while the state librarian, then appointed by the governor, was removable either by the governor or by the legislature.[97] For many years the prison commissioner, elected by the people, was removable by the governor, but in this case the details of the procedure before the governor were specified by statute, and he was required to file the reasons for his action with the secretary of state.[98] This is the only case where an elective state officer has been removable by the governor. Another exceptional case is that of the normal school regents, appointed by the governor and senate, and later by the governor alone, who may be removed for cause by a two-thirds vote of the board.[99]

It is very seldom that the governor has had any authority to remove the subordinates of other officers, but a few instances deserve notice. For some years the governor had the power to

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[87] *Constitution*, Art VII, sec. I.

[88] *Wisconsin Argus*, June 8, 1847, Jan. 4, 1848; *Tri-weekly Argus*, Dec. 28, 1847; *Journal of Constitutional Convention*, 1847-8, p. 91.

[89] *E. g., Laws*, June 1848, p. 55, sec. 1; *Revised Statutes*, 1878, sec. 1821.

[90] *E. g., Laws*, 1876, ch. 57, sec. 1; *Laws*, 1881, ch. 300, sec. 1.

[91] *Laws*, 1852, ch. 477, sec 49; *Laws*, 1856, ch. 49, sec. 49.

[92] *E. g., Laws*, 1901, ch. 420, sec. 2; *Laws*, 1907, st. 926 (162).

[93] *Laws*, 1901, ch. 466, sec. 2.

[94] *Laws*, 1905, ch. 363, sec. 3.

[95] *E. g., Laws*, 1880, ch. 269, sec. 1: *Revised Statutes*, 1898, sec. 1421a.

[96] *E. g., Private and Local Laws*, 1868, ch. 446, sec. 7; *Laws*, 1882, ch. 235, sec. 8.

[97] *Laws*, 1849, ch. 2, sec. 2; *Laws*, 1851, ch. 352.

[98] *Laws*, 1856, ch. 49, sec. 49; *Laws*, 1873, ch. 193.

[99] *Laws*, 1857, ch. 82, sec. 6; *Revised Statutes*, 1898, sec. 397.

remove the county immigration committees (appointed by the board of immigration),[100] and he still has the power to remove clerks of the superintendents of the free employment agencies and the deputy oil inspectors, the former "for cause,"[101] and the latter "upon reasonable notice."[102]

In the removal of county officers the governor has very great power. Under the organic law of the territory this power was dependent wholly upon his power of appointment. When in 1843 he was deprived of the power of appointing certain county officers, it was provided that sheriffs and judges of probate might be removed by him for malfeasance or misfeasance in office, but only after an investigation of the charges by the judge of the district court and upon his certifying to the governor that the officer had been guilty and ought to be removed.[103] In 1848 the constitution empowered the governor to remove any sheriff, coroner, register of deeds, or district attorney, "giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense,"[104] and this provision was extended by an amendment of 1882 to include all other county officers except judicial officers.[105] A statute of 1905 limits the governor's discretion by requiring him to conduct an investigation upon the filing with him of "specific charges of official misconduct or malfeasance in office" against certain of these officers.[106] There was no express provision for the *suspension* of any officer by the governor until 1907, when it was made the *duty* of the governor to suspend, during the investigation and determination of the charges, a district attorney charged with an offense against the

[100] *Laws*, 1868, ch. 171, sec. 4; *Laws*, 1871, ch. 155, sec. 22.

[101] *Laws*, 1901, ch. 420, sec. 11; *Laws*, 1903, ch. 434, sec. 10.

[102] *Laws*, 1901, ch. 466, sec. 2.

[103] *Laws*, 1842-3, p. 9, secs. 13, 15.

[104] *Constitution*, Art. VI, sec. 4. See also *Revised Statutes*, 1849, ch. 11, sec. 4; *Revised Statutes*, 1898, sec. 968. From 1866 to 1872 a statute prohibited the governor from acting upon any charges against the officer unless the person making the charge gave bond conditioned for the payment, should there be no removal, of the expense in the case incurred by the state and by the officer (*Laws*, 1866, ch. 55); but this, probably unwarranted, restriction was removed in 1872 by an act which leaves the requirement of such bond to the governor's discretion (*Laws*, 1872, ch. 27; *Laws*, 1905, ch. 445, sec. 1).

[105] *Constitution*, Art. VI, sec. 4.

[106] *Laws*, 1905, ch. 445, sec. 2.

laws of the state or with refusal to perform the duties of his office.[107] Until 1905 no member of the state administration except the governor was empowered to remove a local officer, but under the provisions of a statute passed that year the tax commissioners may remove the county supervisor of assessments in certain cases.[108]

In the absence of legislation authorizing the appointment of an attorney to take testimony in support of charges made by the governor against county officers, the supreme court held in 1863, that the governor had no authority to employ counsel in such cases;[109] but under the provisions of a statute of 1905 the governor may either conduct the examination in person or may appoint a commissioner to make the investigation and to take and report the testimony.[110] The same law specifies the method of notice of the charges and of the answer thereto. The hearing is said by the supreme court to be of a "judicial" or "quasi-judicial" character, analogous, in its most essential features, to a judicial hearing and investigation.[111]

In addition to his direct power of removal, since 1849 the governor has been authorized to declare vacant the office of every officer required by law to execute an official bond, where a judgment is obtained against the officer for a breach of the conditions of such bond.[112] It may be noticed in this connection that occasionally the legislature makes removals by abolishing an office and immediately recreating it.[113]

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[107] *Laws*, 1907, st. 750a (1); *Wisconsin State Journal*, Feb. 9, 1907. A law of 1887 provides that in the case of neglect of certain duties by the district attorney, the officers of the bureau of labor may file charges against him with the governor and ask for his removal. *Laws*, 1887, ch. 453, sec. 3. By the *Revised Statutes of* 1898 (sec. 10211) they may *demand* his removal in such cases.

[108] *Below*, p. 82.

[109] *Randall v. State*, 16 *Wis.* 340 (1863).

[110] *Laws*, 1905, ch. 445, sec. 2.

[111] *Randall v. State*, 16 *Wis.* 340, 342 (1863); *Larkin v. Noonan*, 19 *Wis.* 82 87 (1865). In regard to the governor's power of removal see also *Attorney General v. Brown*, 1 *Wis.* 514 (1853).

[112] *Revised Statutes*, 1849, ch. 11, sec. 3; *Revised Statutes*, 1898, sec. 963.

[113] *E. g., Laws*, 1871, ch. 136, sec. 12; *Laws*, 1895, ch. 202, secs. 1-2. The clause of the constitution (Art. XIII, sec. 10) which provides that "the legislature may declare the cases in which any office shall be deemed vacant" "clearly confers no authority by direct act to declare a particular office vacant." *State v. Messmore*, 14 *Wis.* 161, 179 (1861).

Approval of Official Bonds, etc. When bonds are required of state officers as a qualification of office (this requirement is usual) the sureties in most cases are subject to the governor's approval, and in many cases the amount of the bond also has been determined by the governor. In a few instances such bonds have been approved by other state officers, and less often by local authorities.[114] The bonds of a very few subordinates (usually subject to the approval of the heads of departments) have been approved by the governor;[115] in at least one case by local authorities.[116] The governor further has the power to increase the amount of the bond required of a few state officers under certain circumstances.[117] In all these cases neglect to give the bond required vacates the office.[118]

Approval and Direction of Administrative Acts. In several instances, the governor's approval has been required for appointments made by other state officers,[119] and sometimes removals by them have been subject to his action.[120] In very many instances the specific functions of state officers have been subject to either the direction or the approval of the governor. In the case of the superintendent of public property this control is so extensive that the governor is still virtually *ex officio* superintendent, as he was expressly termed for several years before the separate office was finally established.[121] The attorney general also is largely subject to the governor's direction.[122] All rules of the civil service commission are subject to his approval.[123]

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[114] *E. g., Laws,* 1864, ch. 167, sec. 4; *Revised Statutes,* 1898, sec. 1732.

[115] *E. g., Revised Statutes,* 1878, sec. 1579; *Laws,* 1905, ch. 490, sec. 11.

[116] *Laws,* 1901, ch. 466, sec. 2.

[117] See especially legislation in reference to the bond of the state treasurer: *Statutes,* 1839, p. 80, sec. 2; *Laws,* June, 1848, p. 13, sec. 4; *Revised Statutes,* 1878, sec. 154; *Revised Statutes,* 1898, sec. 154.

[118] *Revised Statutes,* 1849, ch. 11, sec. 2 (6). *Revised Statutes,* 1878, sec. 962 (7-8); *Revised Statutes,* 1898, sec. 962 (7-8).

[119] See especially *Laws,* 1897, ch. 228; *Laws,* 1903, ch. 144; *Laws,* 1901, ch. 358, sec. 1; *Laws,* 1901, ch. 466, sec. 1. See also *below,* p. 67. Since 1880 the governor's approval has been necessary to the appointment of agents of the Wisconsin Humane Society, a private association with certain police powers. *Laws,* 1880, ch. 179, sec. 1; *Revised Statutes,* 1898, sec. 1636k.

[120] *E. g., Laws,* 1897, ch. 226, sec. 2, *Laws,* 1901, ch. 358, sec. 1.

[121] *Below,* pp. 63, 66-9.

[122] *Below,* pp. 59-62.

[123] *Below,* p. 107. See also *below,* pp. 64-5, 72, 104.

But the governor has very seldom had any such authority over local officers.[124]

Inspection of State Offices. From the time of their establishment the governor has had certain powers of inspection of the state charitable and penal institutions, and this authority has been extended to include all state institutions.[125] With other state officers he also regularly makes examinations of the offices of the state treasurer[126] and the commissioner of insurance.[127]

Reports to the Governor. The only method of control exercised by the governor remaining to be noticed, and the most indirect one, comes from the reports made to him by most of the state officers. Until 1850 such officers were generally required to make reports directly to the legislature, but since that time, as a means of information to the governor in preparing his recommendations to the legislature,[128] in most cases these reports have been made through the governor.[129]

2. ACTS OF DIRECT ADMINISTRATION

The governor has had a great deal of authority in the direct administration of state affairs, but for the most part under temporary provisions of law. The governor of the territory was *ex officio* superintendent of Indian affairs for the territory,[130] and the estimates of the secretary of the treasury of the United States for the "contingent expenses" of the territory were made,

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[124] See especially *below*, pp. 34–5.

[125] *Laws*, 1852, ch. 477, sec. 38; *Laws*, 1857, ch. 88, sec. 17; *Laws*, 1858, ch. 131, sec. 1; *Laws*, 1861, ch. 236, sec. 13; *Revised Statutes*, 1878, sec. 136; *Revised Statutes*, 1898, sec. 136. Since 1895 the governor has been authorized to appoint an agent to inspect these institutions. *Laws*, 1895, ch. 202, sec. 8; *Laws*, 1901, ch. 403. He appointed and directed the old "visiting committee of the state" from the legislature (*Laws*, 1868, ch. 165, sec. 1; *Laws*, 1874, ch. 345), and still appoints the present "legislative visiting committee." *Laws* 1881, ch. 298, sec. 19; *Revised Statutes*, 1898, sec. 562b.

[126] *Below*, p. 56.

[127] *Laws*, 1895, ch. 44, sec. 3; *Revised Statutes*, 1898, sec. 1972c.

[128] *Senate Journal*, 1850, p. 19.

[129] *E. g., Laws*, 1850, ch. 7; *Laws*, 1901, ch. 97. The "cabinet council" of state officers instituted by the governor in 1895 for the purpose of promoting co-operation and harmony in the administration has not been continued. *Oshkosh Northwestern*, Jan. 23, 1895.

[130] *Organic Law*, sec. 2.

apparently for most of the time, by the governor.[131] From 1849 to 1857 the governor was *ex officio* superintendent of public property,[132] and, as was stated above, has practically remained such on account of the degree of control which he exercises over the superintendent. For twelve years before the establishment of the department of insurance he shared the control of insurance companies with the secretary of state,[133] and was connected with the administration of public lands in one way or another until 1878.[134] He still issues charters in some cases, either alone or with the secretary of state.[135] Since 1873 he has collected the criminal statistics of the state.[136] Many of the state bond issues were issued and negotiated by the governor, or by the governor with other state officers.[137] Before the legislation of 1866 with reference to the audit of state accounts the governor's warrant sometimes was substituted for that of the secretary of state,[138] and the governor still draws certain state moneys from the United States treasury.[139] He also establishes quarantines against districts infected with contagious diseases of cattle, etc.[140] But by far the most of the governor's direct administrative power has been derived from very numerous laws prescribing additional administrative duties of a temporary nature, of wonderful variety and probably more than those imposed upon all the other state officers together. Further, the governor has been an *ex officio* member of various permanent and temporary state boards, and still serves on several boards, though no longer on those of the most importance.[141] His powers in the administration of elections are described below.[142]

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[131] *Organic Law*, sec. 11; *House Journal*, 1840-1, appendix, pp. 84-6; *Council Journal*, 1842-3, appendix, pp. 49-56.

[132] *Laws*, 1849, ch. 2; *Laws*, 1857, ch. 95.

[133] *Laws*, 1858, ch. 103; *Laws*, 1870, ch. 56.

[134] *Below*, pp. 71-5.

[135] *Laws*, 1872, ch. 119, sec. 1; *Laws*, 1889, ch. 326, sec. 5; *Revised Statutes*, 1898, secs. 925 (5), 1820.

[136] *Laws*, 1873, ch. 109; *Revised Statutes*, 1898, secs. 1020-1.

[137] *E. g., Local Acts*, 1838-9, No. 26, sec. 1; *Laws*, 1865, ch. 478, sec. 1.

[138] *Below*, p. 45.

[139] *Revised Statutes*, 1849, ch. 9, sec. 6; *Revised Statutes*, 1898, sec. 133.

[140] *Laws*, 1885, ch. 467, secs. 3, 6; *Revised Statutes*, 1898, secs. 1492a, 1492c.

[141] *E. g., below*, pp. 55, 64, 68, 78, 102-3.

[142] Pp. 95, 97.

III. The Governor and the Legislature

The Governor's Recognition of the Legislature. The question as to whether the governor's recognition of the legality of a session of the legislature is necessary to the validity of the acts of the legislature, has never come before the courts of Wisconsin, but it aroused a great deal of interest in the controversy between the governor and the legislative assembly during the session of 1842–3. The governor maintained that a correct interpretation of a recent act of congress prohibited the meeting of the assembly under the circumstances, and when the two houses convened as usual he refused to meet them and to receive any bills passed. Serious doubts were entertained by some as to the validity of the session without the concurrence of the governor as a part of the legislature; while others held that it was only necessary to pass bills and send them to the governor for his signature, and that they would become valid laws, not having been "returned" in accordance with the organic law. The house declared the governor's action to be "unparalleled in the history of this government and a gross violation of all law." The matter was discussed even in congress, where it was asserted that the governor is quite as competent to decide questions of law as the legislature. Meanwhile any disabilities of a session were removed by another act of congress, and the governor called a "special session" of the assembly, which was forced to acknowledge the session to be the "special session" called.[143]

Special Sessions of the Legislature. There is no provision made for special sessions of the legislative assembly in the organic law of the territory, but it is there directed that "the day of the annual commencement of the session" shall be prescribed by the legislative assembly.[144] The statutes of 1839 pro-

[143] *Acts of Congress,* Aug. 29, 1842, 259, sec. 2, 5 *Stat. L.* 540; Dec. 24, 1842, ch. 2; 5 *Stat. L.* 586, 592; *House Journal,* 1842–3, pp. 6, 17–31, 62–5, 75–80, 94–6; *Council Journal,* 1842–3, pp. 117–8, 127–8; *Wisconsin Enquirer,* Dec. 29, 1842; *Wisconsin Democrat,* Dec. 13, 1842, Feb. 21, 28, Mar. 21, 28, 1843; *Madison Express,* Jan. 19, 1843.

[144] *Organic Law,* sec. 4. The amendment of 1838 enacts that "the day for the commencement of the session of the legislative assembly shall be prescribed by law." *Act of Congress,* June 12, 1838, ch. 96, sec. 19, 5 *Stat. L.* 235.

vide that the governor "may, as often as in his opinion the public interest requires it, appoint by proclamation, special sessions to be holden at such times as he may designate."[145] In 1843 the governor declared that very serious doubts were entertained as to whether the territorial law did not conflict with the act of congress,[146] although he had then called a special session, and there had been special sessions called before in 1838 and 1840. By the terms of the constitution in 1848 the governor is given "power to convene the legislature on extraordinary occasions, and in case of invasion, or danger from the prevalence of contagious disease at the seat of government . . . [to] convene them at some other suitable place within the state."[147] An amendment of 1881 requires that when the legislature is convened in special session, "no business shall be transacted except such as shall be necessary to accomplish the special purposes for which it was convened."[148] There have been but few special sessions called, even since the regular sessions became biennial in 1883.

Recommendations to the Legislature. There was no provision for the governor's recommendations to the legislative assembly in the organic law or in the statutes of the territory, but it was the practice of the governor to make such recommendations at the beginning of the session, as well as to send special messages to the assembly from time to time. The constitution provides that the governor "shall communicate to the legislature, at every session, the condition of the state, and recommend such matters to them for their consideration as he may deem expedient."[149] With very few exceptions, until 1882, communications at the opening of the session were made by the governor in person, but since that time the reading of the message by clerks of the legislature has at times been substituted for delivery by the governor in person.

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[145] *Statutes*, 1839, p. 157, sec. 2. See also *Laws*, 1842-3, p. 8, sec. 2. In 1840 a bill in congress to amend the organic law contained a similar provision. *Wisconsin Enquirer*, Apr. 1, 1840.

[146] *House Journal*, 1842-3, pp. 107-8.

[147] *Constitution*, Art. V, sec. 4.

[148] *Constitution*, Art. IV, sec. 11.

[149] *Constitution*, Art. V, sec. 4.

Approval and Veto of Bills. The organic law of the territory vests the legislative power "in the governor and a legislative assembly," and further directs that the "governor . . . . shall approve of all laws passed by the legislative assembly before they shall take effect."[150] This power of absolute veto was qualified in 1839 by an act of congress amending the organic laws of the territories of Wisconsin and Iowa: "Every bill which shall have passed the council and house of representatives . . . shall, before it becomes a law, be presented to the governor of the territory; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall . . . proceed to reconsider it. If after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be considered; and if approved by two-thirds of that house it shall become a law. . . . If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly by adjournment prevent its return, in which case it shall not be a law."[151] This amendment was the outcome of a quarrel between the governor and legislative assembly of Iowa Territory in 1838. The assembly claimed that the governor's many vetoes were unwarranted, that the provision "shall approve" (the same as in the organic law of Wisconsin Territory) was mandatory, that congress had not intended to confer the power of absolute veto upon the governor, etc. The amendment followed the assembly's petition to congress for an express qualification of the governor's power.[152] The organic laws of both territories were included, although the question had apparently aroused little interest in Wisconsin.[153]

In the constitutional convention a proposition to require only a majority vote to pass a bill over the governor's veto was not

[150] *Organic Law,* secs. 2, 4.

[151] *Act of Congress,* Mar. 3, 1839, ch. 90, sec. 1, 5 *Stat. L.* 356.

[152] *Miner's Free Press,* Dec. 18, 1838; Shambaugh, *Constitutions of Iowa,* pp. 126-44; *Annals of Iowa,* Vol. VIII., pp 159-65; Parish, *R. Lucas,* pp. 183-219.

[153] But see *Wisconsin Enquirer,* Mar. 2, 1839.

accepted. The veto in any form was obnoxious to some as an "anti-republican" institution, and it was asserted that the two-thirds requirement meant practically an absolute veto; but the provision was justified as exercised by an authority elected by and responsible to the *whole* people, as a substantial restraint upon coördinate branches of the government.[154] The constitution of 1848 only slightly changed the amended organic law in this respect, requiring the repassage by two-thirds of "the members present" in each house instead of two-thirds of "each house."[155] A constitutional amendment to be submitted to the people in 1908 allows the governor more adequate time for the examination and consideration of bills, substituting six days for the three days previously allowed.[156]

The provisions for amendments to the constitution would not seem to require the concurrence of the governor with the legislature,[157] and reference is made to orders, resolutions, etc., but the practice has varied in both cases, the governor's approval apparently being considered as necessary in many more instances in the earlier history of Wisconsin than at present.[158]

[154] *Wisconsin Argus,* Dec. 28, 1847, Jan. 4, 1848; *Journal of Constitutional Convention,* 1847–8, pp. 72–4, 87–90.

[155] *Constitution,* Art. V, sec. 10.

[156] *Laws,* 1907, ch. 661, sec. 2. See *Senate Journal,* Special Session, 1905, pp. 15–6.

[157] *Constitution,* Art. XII, secs. 1–2.

[158] It has been contended that although a *de facto* governor may *execute* laws he cannot *make* them (*Weekly Wisconsin Patriot,* Jan. 12, 1856), but the supreme court makes no such distinction, and has declared a bill approved by a *de facto* governor to be a valid law. *State v. Williams,* 5 *Wis.* 308 (1856). It is essential that the governor approve "the same law which the legislature has passed." *State v. Wendler,* 94 *Wis.* 369, 379 (1896). The right to approve bills after the final adjournment of the legislature is "at least extremely doubtful" (*Assembly Journal,* 1869, pp. 14–5; *Wisconsin State Journal,* Apr. 4–6, 1883), and approvals have not been so made for many years. A temporary adjournment is now considered to extend the period allowed the governor for the approval of bills (*Senate Journal,* 1897, pp. 1013–4; *Assembly Journal,* 1897, p. 1297; *Wisconsin State Journal,* Apr. 29, 1897), although the contrary has been maintained. *Senate Journal,* 1862, pp. 851–4. It is conceded that the governor may not revise his action on a bill when once he has deposited the same with the secretary of state. *Assembly Journal,* 1866, pp. 1136-7; *Wisconsin State Journal,* Apr. 9, 1866. The surrender of bills recalled from the governor by the legislature is of "questionable validity" (*Senate Journal,* 1897, pp. 690–7), but the practice continues. *Rules of the Legislature,* No. 94, *Blue Book,* 1907, p. 112.

In connection with the governor's relations with legislation it may be added that he is authorized to "set aside" certain days as holidays. E. g., *Local Acts,* 1838–9, Second Session, Resolution, No. 10; *Laws,* 1893, ch. 271; *Revised Statutes,* 1898, sec. 137b.

Appointment of Legislative Committees. Various temporary commissions on legislation have been appointed by the governor from time to time,[159] and the permanent commission for the uniformity of legislation is appointed by him.[160] He has also always appointed the regular committees of the legislature for the visitation of the state charitable and penal institutions.[161]

IV. The Judicial Functions of the Governor

Pardons. The organic law of the territory empowered the governor to grant pardons for offenses against the laws of the territory, and reprieves for offenses against the laws of the United States,[162] and a law of the territory of 1840 expressly authorized him to grant conditional pardons.[163] By the terms of the constitution he is given power "to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons." Upon a conviction for treason the governor may suspend the execution of the sentence until the case can be reported for the action of the legislature. He must report to the legislature all cases of reprieves, commutations, or pardon granted, and state his reasons for granting the same.[164]

By way of regulations "relative to the manner of applying for pardons" the legislature has restricted the governor's power somewhat by directing that no pardon shall be granted (the

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[159] *E. g., Laws,* 1856, ch. 126, sec. 1; *Laws,* 1897, ch. 371, sec. 1.

[160] *Laws,* 1893, ch. 83; *Laws,* 1895, ch. 239; *Revised Statutes,* 1898, sec. 127a.

[161] *Laws,* 1868, ch. 165, sec. 1; *Laws,* 1874, ch. 345; *Laws,* 1881, ch. 298; *Revised Statutes,* 1898, sec. 562b.

[162] *Organic Law,* sec. 2.

[163] *Laws,* 1839-40, No. 44, sec. 11. Until 1878 such conditional pardon might issue only "upon the petition of the person convicted." *Revised Statutes,* 1878, sec. 4859; *Revised Statutes,* 1898, sec. 4859.

[164] *Constitution,* Art. V, sec. 6. Since 1878 the governor has been expressly authorized, upon hearing of a breach of condition by a convict pardoned on condition, to order his arrest and, if satisfied that the condition has been broken, to remand him to prison. *Revised Statutes,* 1878, sec. 4862-3; *Revised Statutes,* 1898, secs. 4862-3.

provision including only pardons in case of murder was later extended to include all pardons from the state prison) unless the warden of the prison where the applicant is confined has certified to the governor that during confinement the prisoner has conducted himself "in a peaceful and obedient manner."[165] Several provisions have aided the governor in forming an opinion on the merits of an application, by requiring that the application be accompanied with the recommendation of the trial judge or the judge in office at the time the application is made and a statement of the views of the prosecuting attorney in the case, and with copies of the court record, etc.[166] A knowledge of the application by the public is insured by the requirement for its publication.[167] These regulations apply only to a certain extent to convicts sentenced to the Milwaukee house of correction or to the state reformatory.[168] Recently, in case of sentences to the latter, the governor has been given power to grant pardons, on the recommendation of the superintendent and state board of control, without the proceedings required in applications for pardons generally.[169] Since 1868 the governor has been expressly authorized by statute to make such additional regulations governing the application for pardons as he deems best.[170]

A law of 1852 allowed the governor to make a special order in his pardon restoring to office a convict (who according to law forfeits his office upon committment to the state prison),[171] but since 1871 a pardon may not have this effect.[172] Laws of 1879 and 1891 authorizing the governor to restore civil rights to discharged convicts upon satisfactory evidence that the

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[165] *Laws*, 1856, ch. 84, sec. 3; *Laws*, 1868, ch. 113, sec. 7; *Revised Statutes*, 1898, sec. 4857. *Cf. Senate Journal*, 1868, pp. 197-8.

[166] *Laws*, 1856, ch. 84, secs. 1-2; *Laws*, 1868, ch. 113, secs. 3-4; *Revised Statutes*, 1878, secs. 4855-8; *Revised Statutes*, 1898, secs. 4855-8.

[167] *Laws*, 1868, ch. 113, sec. 2; *Revised Statutes*, 1878, sec. 4856; *Revised Statutes*, 1898, sec. 4856.

[168] *Revised Statutes*, 1878, sec. 4864; *Revised Statutes*, 1898, sec. 4864.

[169] *Laws*, 1899, ch. 28, sec. 1 (4944k). Since 1871 the provisions in regard to applications do not apply to applications for pardons to be granted within ten days before the expiration of the convicts' term. *Laws*, 1871, ch. 56; *Revised Statutes*, 1898, sec. 4861. No procedure is prescribed where the convict has served the full term. *Cf. Report of Attorney General*, 1903-4, pp. 454-5.

[170] *Laws*, 1868, ch. 113, sec. 8; *Revised Statutes*, 1898, sec. 4861.

[171] *Laws* 1852, ch. 477, sec. 24.

[172] *Laws*, 1871, ch. 115, sec. 27; *Revised Statutes*, 1898, sec. 4935.

convict had violated no law of the state for a specified period subsequent to his discharge,[173] were considered to be invalid by the revisers of 1898, probably as encroachment upon the governor's constitutional power, and were omitted from the *Revised Statutes* of that year.[174]

Statutory provisions, beginning in 1860, for the reduction of sentences of convicts upon the issue of "good time" certificates by the authorities of the state penal institutions[175] have to some extent lessened the necessity for the exercise of the pardoning power, but the governor's constitutional position makes the validity of all of these measures somewhat doubtful.[176] The supreme court intimated,[176a] although it did not decide, that the law of 1889 allowing courts to impose indeterminate sentences in certain cases of imprisonment in the state prison[177] encroached upon the governor's power, and it was therefore omitted from the *Revised Statutes* of 1898.[178]

Under the provisions of the law of 1897 the state board of control had only advisory powers in the granting of paroles to convicts in the state reformatory,[179] but since 1899, upon the

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[173] *Laws*, 1879, ch. 207; *Laws*, 1891, ch. 236.

[174] *Revised Statutes*, 1898, sec. 4864 and note.

[175] *Laws*, 1860, ch. 324, sec. 1; *Laws*, 1880, ch. 238, secs. 1-4; *Revised Statutes*, 1898, sec. 4928; *Laws*, 1875, ch. 174, sec. 1; *Laws*, 1897, ch. 346, secs. 7, 11; *Laws*, 1899, ch. 28, sec. 1 (49441).

[176] This was asserted in regard to the law of 1876 (*Governor's Message*, 1877, p. 11; *In re Pikulik*, 81 *Wis.* 158, 160 (1892); *Revised Statutes*, 1898, sec. 4942 and note), and the validity of the provision of the present statutes has been declared by the supreme court "to say the least, a question of very grave doubt." *Baker v. State*, 88 *Wis.* 140, 157 (1894). But a change of opinion would seem to be expressed in a later case. *In re Linden*, 112 *Wis.* 523, 529 (1902). By statutes of 1860 (*Laws*, 1860, ch. 324, sec. 3. Probably not in force after 1874. *Laws*, 1873, ch. 193, sec. 64.) and 1875 (*Laws*, 1875, ch. 174, sec. 2. Probably not in force after 1878. *Revised Statutes*, 1878, sec. 4855), both, it would seem, clearly invading the pardoning power, certificates of good conduct from the state prison commissioner and the inspector of the Milwaukee house of correction respectively, restored convicts to citizenship upon the expiration of their terms of sentence.

[176a] *In re Pikulik*, 81 *Wis.* 188 (1892); *In re Schuster*, 82 *Wis.* 610 (1892).

[177] *Laws*, 1889, ch. 390.

[178] *Revised Statutes*, 1898, secs. 4733, 4942 and note. A similar provision of 1899 in reference to certain classes of convicts sentenced to the state reformatory (*Laws*, 1899, ch. 28, sec. 1 (4944d) was repealed in 1907. *Laws*, 1907, st. 4944d.) From the recent expression of the supreme court *in re Linden*, 112 *Wis.* 523, 528 (1902), it would be inferred that such provisions are not unconstitutional.

[179] *Laws*, 1897, ch. 346, secs. 4, 7.

recommendation of the superintendent, the board has been allowed to grant such paroles without any authority whatever from the governor.[180] A bill of 1905 giving similar power to the board in the case of convicts in the state prison[181] was vetoed by the governor, partly because he considered it to be unconstitutional.[182] At the next session of the legislature a bill was passed authorizing paroles from the state prison to be issued by the board, but the approval of the governor is required,[183] and thus any constitutional difficulty is doubtless avoided.[184]

In 1860 the governor was expressly authorized under certain conditions to suspend sentences of solitary confinement in the state prison,[185] but this provision was omitted in the statute of 1873 which gives such power to the directors (state board of control).[186] Penalties and forfeitures against railroad companies may not be released, under the statutes, by the governor alone, but by a board consisting of the governor, secretary of state, and attorney general.[187]

Attempts made at various times to control the governor's power by establishing a board of pardons have not been successful.[188]

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[180] *Laws*, 1899, ch. 28, sec. 1 (4944j).

[181] *Bills*, 1905, No. 125 S.

[182] *Senate Journal*, 1905, pp. 910–2.

[183] *Laws*, 1907, st. 4960c.

[184] *Cf. Wisconsin State Journal*, Feb. 1, Aug. 9, 14, 27, 1907.

[185] *Laws*, 1860, ch. 324, sec. 2.

[186] *Laws*, 1873, ch. 193, sec. 49; *Revised Statutes*, 1898, sec. 4929.

[187] *Laws*, 1905, ch. 328, sec. 5. In *Board of Supervisors v. Sullivan*, 51 *Wis.* 115 (1881), it was held that under the statutes the county board of supervisors has no authority to compromise a fine, but the power of the legislature to grant such an authority was not discussed.

[188] *E. g., Senate Journal*, 1895, pp. 38–9; *Senate Journal*, 1897, p. 197. The great number of pardons issued has been considered an abuse of power—a "one-man power of irresponsible and final judicial veto." *Report of Commissoner of State Prison*, 1873, p. 5; *Wisconsin State Journal*, Aug. 2–3, 1883, Dec. 12, 1896, Jan. 13, Feb. 16, Mar. 9, 1897. It is also pointed out that the hearings of applications for pardons consume too much of the governor's time and that he cannot give sufficient attention to each case. *Wisconsin State Journal*, Nov. 20, 1888; *Assembly Journal*, 1897, p. 58; *Wisconsin State Journal*, Jan. 13, Feb. 16, 1897. But in 1899 the governor, in favor of a board of pardons before his experience in office, had become convinced that the creation of a board would tend to increase the number of pardons by dividing the responsibility. *Senate Journal*, 1899, p. 37.

For a criticism of the practice of holding public hearings in pardon cases, see *Wisconsin State Journal*, Aug. 30, 1907.

Death Warrants. The *Statutes* of 1839 provide that the death sentence—abolished in 1853[189]—shall not be executed without a warrant issued by the governor commanding the sheriff to cause execution.[190] In certain cases the governor was expressly authorized to delay the issue of his warrant or to respite the execution.[191]

Extradition. The first legislation in reference to the governor's power of extradition[192] was enacted in 1840. By the law of that year, upon application to the governor for a requisition on a state or territory for a fugitive from justice it is made the duty of the district attorney or other prosecuting officer, when required by the governor, to investigate the matter and report to him;[193] and a law of 1858 requires the approval of this prosecuting officer previous to the issue of a requisition; but in case of the refusal or inability of this officer to act, or in other cases where proper proofs of the necessity of a requisition are furnished to the governor, this approval may be dispensed with.[194]

Provision also for the delivery to other states or territories of fugitives from justice was made in 1840. When a requisition for such fugitives is made upon the governor, the district attorney or other prosecuting officer, when required by the governor, must investigate the grounds of the demand and report to the governor, and the governor is directed, if satisfied that the demand should be complied with, to issue a warrant authorizing the agent making the demand to take custody of the fugitive, and to require "the civil officers within this territory" (state) to

[189] *Laws,* 1853, ch. 103.

[190] *Statutes,* 1839, p. 378, sec. 7.

[191] *Statutes,* 1839, p. 378, sec. 8.

[192] *Constitution of the United States,* Art. IV, sec. 2; *Act of Congress,* Feb. 12, 1793, ch. 7, 1 *Stat. L.* 302.

[193] *Laws,* 1839-40, No. 44, sec. 5; *Revised Statutes,* 1898, sec. 4843.

[194] *Laws,* 1858, ch. 118, secs. 2, 5; *Revised Statutes,* 1898, secs. 4844-5. The agents appointed by the governor to secure such fugitives were regarded as state officers at first, as their accounts were audited by the governor and paid out of the state treasury (*Laws,* 1839-40, No. 44, sec. 5), but later the accounts have been audited and paid by the county authorities except in the case of very grave offenses (*Laws,* 1858, ch. 118, sec. 1), and since 1867, all these accounts have been so settled. *Laws,* 1867, ch. 155, sec. 1; *Revised Statutes,* 1898, sec. 4843.

afford "all needful assistance" in the execution of the warrant.[195]

Rewards for Capture of Criminals. Since 1843, when any person is charged with a felony, or when any heinous crime has been committed, the governor has been authorized to offer a reward, not to exceed an amount prescribed by law, for the apprehension of the criminal.[196]

V. The Control of the Courts over the Governor

The constitution has not specified the control to be exercised by the courts over the governor, and adjudications have not finally settled the question except in the case of *quo warranto.*

In *State v. Farwell*[197] Justice Howe, answering the governor's contention that the court has no authority by *mandamus* to enforce the performance by the governor of any part of his executive duties, uttered a *dictum* to the effect that the same remedies are provided against the governor as against other officers of the state, and that "in a proper case the judicial power of the state may obtain jurisdiction over the person of its chief executive officer." But the very next year, in *Attorney General v. Brown,*[198] the supreme court declared that "whatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government," and within a few years later the court had refused to attempt by *mandamus* to compel the governor to sign patents, a duty expressly imposed upon him by statute,[199] and perhaps had held that the governor cannot be compelled by *mandamus* to perform "any executive duty."[200]

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[195] *Laws,* 1839–40, No. 44, sec. 6; *Revised Statutes,* 1898, sec. 4847. On the subject of requisitions, see further, *Report of Attorney General,* 1904, pp. 32–56.

[196] *Laws,* 1842–3, p. 60; *Revised Statutes,* 1849, ch. 9, sec. 3; *Revised Statutes,* 1898, sec. 132. The *Revised Statutes* of 1878, sec. 132, authorize the governor to "finally determine" to whom the reward is to be paid. *Revised Statutes,* 1898, sec. 132.

[197] 3 *Pinney,* 393, 425 (1852).

[198] 1 *Wis.* 513, 522 (1853).

[199] *State v. Harvey,* 11 *Wis.* 33, 34, (1860). No objection has been taken to the court's jurisdiction in cases of *mandamus* to compel the commissioners of public lands to issue patents. *E. g., State v. Timme,* 60 *Wis.* 344 (1884).

[200] Counsel in *Attorney General v. Barstow,* 4 *Wis.* 567, 615 (1856).

However, in 1892 the same court declares in a *dictum* that "even the governor, with other state officers, having a . . . ministerial duty to perform, will be enjoined from carrying out an unconstitutional law."[201]

The contest between the two claimants to the office of governor in 1856 for a while assumed a very serious aspect, the *de facto* governor contending that the supreme court had no jurisdiction over him in *quo warranto* proceedings, and threatening to repel any encroachment upon his rights "with all of the force vested in this department."[202] Against the contention that the independence of the executive would be destroyed by the court's taking jurisdiction of the contest, it was held that an unlawful intrusion into, or usurpation of, the office of governor may be tried in the supreme court by an information in the nature of a *quo warranto*, and the intruder ousted and punished.[203] Whereupon the *de facto* governor *"resigned."*[204]

In 1882 the governor made a return to a writ of *certiorari* issued by one of the justices of the supreme court, although at the same time he protested against the court's assuming jurisdiction, declaring that the writ does not issue to a coördinate branch of the government; but the question was left undecided. The writer of the opinion of the court, however, expressed "grave doubts whether this court had jurisdiction to send its process to the chief executive officer of the state—the head of a co-ordinate department of the state government."[205]

VI. The Lieutenant Governor

There was no lieutenant governor of the territory, but "in case of the death, removal, resignation, or necessary absence" of the governor from the territory, the secretary of the territory acted in his place.[206] In the constitutional convention the pro-

[201] *State v. Cunningham*, 81 *Wis.* 440, 481 (1892). But see *Wisconsin State Journal*, Aug. 30, 1904.

[202] *Assembly Journal*, 1856, pp. 552-8, 705-10, 759-66, 779-82.

[203] *Attorney General v. Barstow*, 4 *Wis.* 567 (1856).

[204] *Senate Journal*, 1856, pp. 793-5.

[205] *State v. Rusk*, 55 *Wis.* 465, 479 (1882).

[206] *Organic Law*, sec. 3.

position to create the office of lieutenant governor was at first rejected, and the duties of the office were made to devolve upon the president of the senate, but finally the original proposition was adopted.[207] The constitution provides for the election of the lieutenant governor at the same time and for the same term and in the same manner as the governor.[208] The duties of the governor devolve upon him "in case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease, resignation or absence from the state."[209] The secretary of state is next in succession.[210] But when the office of governor becomes vacant, although the governor's duties then devolve upon the lieutenant governor, it is held that he does not then become governor, but only acting governor, so that he retains the office of lieutenant governor and performs the duties of both offices.[211] If under such circumstances he becomes unable to act, the secretary of state will perform the duties of three offices, governor, lieutenant governor, and secretary of state.[212]

The constitution in 1848 provided that the lieutenant governor should receive double the *per diem* of a state senator for every day's attendance as president of the senate and the same mileage as allowed the members of the legislature,[213] but since the amendment of 1869 he has received an annual salary of one thousand dollars.[214] The statutes of 1849 provided that while acting as governor he should receive the governor's salary in full compensation for his services,[215] but since 1864 he has received five dollars a day in addition to his other compensation for such services.[216] It would seem that the latter provision was also intended

[207] *Wisconsin Argus*, Dec. 28, 1847, Jan. 4, 1848; *Journal of Constitutional Convention*, 1847-8, pp. 76-9, 86.

[208] *Constitution*, Art. V, secs. 1-3; *above*, p. 10.

[209] *Constitution*, Art. V, sec. 7. "But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of the military force thereof, he shall continue commander-in-chief of the military force of the state." *Ibid.*

[210] *Constitution*, Art. V, sec. 8.

[211] *Report of Attorney General*, 1906, pp. 420-2, 602-5.

[212] *Report of Attorney General*, 1906, pp. 706-7.

[213] *Constitution*, Art. V, sec. 9.

[214] *Constitution*, Art. V, sec. 9.

[215] *Revised Statutes*, 1849, ch. 9, sec. 5.

[216] *Laws*, 1864, ch. 137; *Revised Statutes*, 1898, sec. 170. *Cf. Report of Attorney General*, 1904, pp. 290-1.

as "full compensation," but it is the opinion of the attorney general that when the powers of the governor devolve upon the lieutenant governor, the power to draw the governor's salary is included, and this seems generally to have been the practice followed.[217]

The only official duty of the lieutenant governor, when not performing the duties of governor, is to act as the president of the senate.[218] In the trial of an impeachment he may not be a member of the court.[219]

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[217] *Report of Attorney General,* 1906, pp. 602-5. It should be noted that a provision of the *Revised Statutes* of 1849 (ch. 9, sec. 5) to the effect that the governor's salary should cease while the lieutenant governor acted in his place, was omitted in an amendment of 1864. *Laws,* 1864, ch. 137.

[218] *Constitution,* Art. V, sec. 8.

[219] *Constitution,* Art. VII, sec. 1. For a while the lieutenant governor was a member of the state board of equalization. *Below,* p. 78.

CHAPTER II

THE SECRETARY OF STATE

I. The Organization of the Secretary's Office. II. The Secretary's Functions. 1. General Secretarial Duties. 2. Control over State Finances. *General Control.—Audit of Public Accounts.—Accounts with Receivers of State Moneys.—Auditor's Books and Reports.* 3. Control other than Financial over State Officers. 4. Miscellaneous Functions.

I. The Organization of the Secretary's Office

The office of secretary of state is a combination of two distinct territorial offices, that of secretary of the territory and that of auditor of public accounts. The office of secretary was created by the organic law of the territory,[1] but that of auditor, until provided for by the legislative assembly in 1839,[2] existed by virtue of a law adopted from Michigan.[3] In 1848 the constitution made the secretary of state *ex officio* auditor.[4]

The secretary of the territory, like the governor, was appointed by the president and senate,[5] and the auditor was appointed by the governor and council;[6] but the secretary of state has always been elected by the people.[7] The secretary of the territory and the auditor held office for four years[8] and three years,[9] respect-

[1] *Organic Law*, sec. 11.
[2] *Statutes*, 1839, p. 81.
[3] *Organic Law*, sec. 12; *Michigan Laws Condensed*, 1833, p. 177; *House Journal*, 1837-8, pp. 192-3.
[4] *Constitution*, Art. VI, sec. 2.
[5] *Organic Law*, sec. 11.
[6] *Statutes*, 1839, p. 81, sec. 1.
[7] *Constitution*, Art. VI, sec. 1.
[8] *Organic Law*, sec. 3.
[9] *Statutes*, 1839, p. 81, sec. 1.

ively, while the secretary of state is elected for two years.[10] No bonds were required of the secretary of the territory, but the auditor was bonded for five thousand dollars.[11] The secretary of state gives bonds for twenty-five thousand dollars, approved by the governor.[12] The auditor's salary increased from sixty to one hundred dollars,[13] while that of the secretary of the territory was fixed at twelve hundred dollars,[14] with a considerable addition for "extra services" until 1841.[15] When the two offices were combined the salary was made twelve hundred dollars,[16] and this was increased to five thousand dollars in 1876.[17] But it was not until 1859 that the secretary was required to account for fees received and to pay into the state treasury any amount above two thousand dollars coming from this source.[18] Since the increase in salary in 1876 the secretary has been required to pay over all fees received.[19]

The assistant secretary of state, first known as deputy secretary of state, whose office was provided for in 1849, is appointed by the secretary, and, in case of the latter's disability, is authorized by law to perform all the duties of secretary except as commissioner of public lands and as auditor.[20] His salary, at first fixed by the secretary and paid by the latter,[21] was made one thousand dollars in 1854,[22] and has increased to two thousand five hundred dollars.[23] A law of 1848 expressly directed that no compensation should be allowed the secretary for clerk hire,[24]

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[10] *Constitution*, Art. VI, sec. 1.

[11] *Statutes*, 1839, p. 81, sec. 2.

[12] *Laws*, June, 1848, p. 115, sec. 1; *Revised Statutes*, 1898, sec. 138.

[13] *Statutes*, 1839, p. 81, sec. 8; *Laws*, 1846, p. 198, sec. 1.

[14] *Organic Law*, sec. 11.

[15] *Laws*, 1840–1, No. 28, secs. 1–2; *Act of Congress*, Aug. 29, 1842, ch. 259, sec. 1, 5 *Stat. L.* 540; *House Journal*, 1840–1, appendix, p. 92.

[16] *Laws*, June, 1848, p. 115, sec. 34.

[17] *Laws*, 1876, ch. 341, sec. 2; *Laws*, 1907, st. 170 (2).

[18] *Laws*, 1859, ch. 189.

[19] *Laws*, 1876, ch. 341, sec. 2; *Revised Statutes*, 1898, sec. 141 (9). *Cf. below*, p. 54.

[20] *Revised Statutes*, 1849, ch. 9, sec. 12; *Laws*, 1854, ch. 65, secs. 1, 3; *Revised Statutes*, 1878, sec. 139; *Revised Statutes*, 1898, sec. 139. See *below*, p. 46.

[21] *Revised Statutes*, 1849, ch. 9, sec. 25.

[22] *Laws*, 1854, ch. 65, sec. 2.

[23] *Laws*, 1865, ch. 456, sec. 1; *Laws*, 1907, st. 170 (2).

[24] *Laws*, June, 1848, p. 115, sec. 34.

and there was no permanent provision for such expenses until 1856, when the necessary appointments and the compensation of clerks were left to the secretary's discretion.[25] But since 1897 the clerkships and salaries have been determined by statute.[26]

II. The Secretary's Functions

1. General secretarial duties

The secretary has always kept a record of the official acts of the executive and legislative departments, limited in the latter case to filing the enrolled laws and resolutions and preserving the records of the legislature in his office,[27] and he is, generally speaking, the custodian of state documents.[28] He affixes the great seal ,of which he is custodian, to all the governor's official acts except his approval of the laws, and countersigns the same.[29]

2. Control over state finances

General Control. The authority of the secretary of state is most apparent in the control which he exercises over the finances of the state, especially in the audit of public accounts and in the administration of taxation.[30] His general financial control

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[25] *Laws*, 1856, ch. 53.

[26] *Laws*, 1897, ch. 355; *Laws*, 1907, st. 170 (2).

[27] *Organic Law*, sec. 3; *Constitution*, Art. VI, sec. 2; *Laws*, June, 1848, p. 115, sec. 6; *Revised Statutes*, 1849, ch. 9, secs. 10 (1, 6), 13; *Revised Statutes*, 1898, secs. 141 (1, 6), 108.

[28] *E. g., Laws*, June, 1848, p. 115, sec. 2-3, 6; *Revised Statutes*, 1898, secs. 141 (3), 142. It is a question whether in most cases, these documents are open to inspection by the public, or the secretary may limit the inspection to that made by the governor or a committee of the legislature. *Laws*, June, 1848, p. 115, secs. 3-4; *Revised Statutes*, 1849, ch. 9, sec. 10 (3, 5, 6); *Laws*, 1874, ch. 32, sec. 3; *Revised Statutes*, 1898, secs. 141 (3, 5-6), 142, 333; *Wisconsin Daily Patriot*, Jan. 12, 14, 1856; *Wisconsin State Journal*, Sept. 11, 13, 14-6, 18, 1875; *Milwaukee Sentinel*, July 22, 1904; *Wisconsin State Journal*, Aug. 8, 15, 1906.

[29] *Constitution*, Art. 13, sec. 4; *Revised Statutes*, 1849, ch. 9, sec. 10 (2); *Revised Statutes*, 1898, sec. 141 (2). Since 1877 the secretary has had a "lesser seal" for his own use. *Laws*, 1877, ch. 210, secs. 1-3; *Revised Statutes*, 1898, sec. 98.

[30] The secretary's functions in the administration of taxation are described *below*, pp. 77-81, 84, 89-93.

consists in the superintendence and management of the fiscal concerns of the state, in suggesting plans for the improvement of the public revenues, and in directing the collection of all dues to the state.[31]

Audit of Public Accounts. While directing that the auditor should audit all claims in *favor* of the territory, the statutes of 1839 made no express provision in regard to claims *against* the territory,[32] and hence any implied right to audit the latter class of claims was for a time at least questioned.[33] But the law of 1848 both provides for the settlement of all accounts due the state by the secretary, and expressly requires him to audit all claims against the state when provision for payment has been made by law.[34]

During the territorial period and the early years of the state general provisions of law for such payments were comparatively few, being limited, for the most part, to appropriations for the salaries of officers, etc. Usually the legislature preferred to take charge of the whole matter and to create long lists of special appropriations for the ordinary expenses of government.[35] More direct limitations of the auditor's authority have been created by legislation allowing the actual audit to be performed by other officers, or providing for the payment of money from the state treasury without any warrant at all, or directing lump sums of money to be paid to officers to be disbursed by them, or allowing officers to receive and disburse funds which have not passed through the treasury at all and over which the secretary has hence had no control. These five limitations and their gradual

[31] *Laws,* June, 1848, p. 115, sec. 10 (1, 3, 6, 8); *Revised Statutes,* 1898, sec. 144 (1, 6, 9, 12).

[32] *Statutes,* 1839, p. 81, sec. 4.

[33] *House Journal,* 1841–2, p. 497.

[34] *Laws,* June, 1848, p. 115, sec. 10 (5, 7). The *Revised Statutes* of 1878, secs. 144 (10), 145, more explicitly provide that the secretary shall audit "all accounts and claims against the state, when payment thereof is provided to be paid out of the state treasury, and the rate of compensation is fixed by law or authorized to be fixed by some officer or person, or by the secretary of state." *Revised Statutes,* 1898, secs. 144 (8, 10), 145 and note. "As used in our constitution it [the term "auditor"] signifies an officer whose business it is to examine and certify accounts and claims against the state, and keep an account between the state and its treasurer." *State v. Hastings,* 10 *Wis.* 525, 530 (1860).

[35] *Governor's Message,* 1857, p. 11.

and almost complete removal will be described in the order in which they have been mentioned.

1. During the period when the legislature was much given to special appropriations, occasionally individual cases would be referred to the auditor for settlement by the special act of appropriation,[36] but usually claims did not come before him at all prior to the action of the legislature. A Michigan law, in force in Wisconsin until 1839, required the auditor, when no provision for the payment of a claim had been made by law, or when the provision was insufficient, to examine the claim and report to the legislature.[37] A similar provision was enacted in 1848,[38] but in practice the auditor seems to have been ignored by the legislature,[39] and the provision was soon repealed.[40] It was revived again in 1860, the law now providing that all claims requiring legislative action be filed in the office of the secretary of state, who is required to examine the same and to report his findings to the legislature.[41]

Next, the number of "claims requiring legislative action" was cautiously and gradually reduced by the substitution, in place of the innumerable special acts of appropriation, of general provisions for the secretary's audit of claims of which "the rate of compensation is fixed by law or authorized to be fixed by some officer or person, or by the secretary of state."[42]

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[36] *E. g., Laws,* 1853, ch. 104; *Laws,* 1856, ch. 18.

[37] *Michigan Laws Condensed,* 1833, p. 177, sec. 1; *Organic Law,* sec. 12; *Statutes,* 1839, p. 404; *House Journal,* 1837-8, pp. 192-3.

[38] *Laws,* June, 1848, p. 115, sec. 10 (7).

[39] *Report of Secretary of State,* 1854, pp. 13-4.

[40] *Laws,* 1857, ch. 61.

[41] *Laws,* 1860, ch. 274, secs. 1-2: *Revised Statutes,* 1898, sec. 147. This provision also aids the secretary in making his estimates to the legislature. *Senate Journal,* 1850, pp. 398-9; *below,* pp. 76-7.

[42] *Above,* p. 42. This development is best illustrated by the following provisions: *Laws,* 1836, No. 42; *Laws,* June, 1848, p. 177, sec. 3; *Laws,* 1852, ch. 504, sec. 19; *Laws,* 1857, ch. 99, sec. 10; *Laws,* 1858, ch. 114, sec. 20; *Laws,* 1866, ch. 48, sec. 4: *Revised Statutes,* 1898, secs. 293, 326. *Cf. Report of Secretary of State,* 1854, pp. 13-14; *Senate Journal,* 1854, pp. 287-8; *Governor's Message,* 1857, 11; *Wisconsin State Journal,* Feb. 14, 1862. The natural result of the early method is thus stated in the *Report of the Joint Committee of Investigation into the Affairs of the Several State Departments,* 1858, pp. 4-5: "A critical and careful examination of the audited accounts on file here demonstrates a stern necessity for some more efficient system of settling miscellaneous accounts arising against the state. One of the greatest drains upon the

2. When the amount of a claim against the state is definitely fixed by law "the secretary has nothing to do but to draw his warrant."[43] But as for other claims the secretary maintained, as early as 1865, that they "must be allowed upon evidence satisfactory to him, and that the legislature does not possess the power to say that he shall allow a claim upon the certificate of any officer, or other evidence which is not entirely satisfactory to him."[44] However, in 1891 the state superintendent, in the absence of any law requiring him to file vouchers for his expenses with the secretary, claimed the right "to audit his own expense account,"[45] and the secretary acknowledged it to be his duty to draw warrants in favor of that officer without requiring any vouchers for the expenditures made, thus rendering the issue of his warrant a mere perfunctory act.[46] But the supreme court would permit no such curtailment of the auditor's power, and in *State v. Cunningham*[47] practically endorsed the view of the secretary of 1865 by requiring proper proofs of expenses to be submitted to the secretary, and maintaining that it is incompetent for the legislature to make an officer the auditor exclusively to determine the amount of his expenditures.[48]

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treasury is through the present imperfect system of adjusting these claims. . . . If done by the legislature it is impossible to prevent designing persons from taking advantage of two different sessions and receiving duplicate or extravagant appropriations for services and supplies . . . It is impossible for a legislative body to act either directly or through a committee, intelligently and understandingly, upon all the claims presented, and it is still more impossible for one legislature by appropriation and payment of a debt to prevent a rejected overcharge from being presented to a subsequent legislature, which in ignorance of all the facts in the case, may establish the claim and make another appropriation."

[43] *State v. Cunningham,* 82 Wis. 39, 52 (1892).

[44] *Message and Documents,* 1865, pp. 81-2; *Laws,* 1860, ch. 343, sec. 5.

[45] *Report of State Superintendent,* 1892, p. 12.

[46] *State v. Cunningham,* 82 Wis. 39 (1892).

[47] 82 *Wis.* 39 (1892).

[48] The numerous provisions in the statutes directing the auditor to issue warrants upon the certificates of certain officers are not objectionable so long as they are construed merely as limitations on the auditor in preventing him from acting without the certificate, and are not considered as furnishing conclusive evidence for his decision. But in the construction of a statute [*Laws,* 1903, ch. 84, sec. 1 (13)] requiring the presiding judge to tax certain costs and certify the same to the secretary of state, "who shall thereupon draw his warrant upon the state treasurer for the respective amounts allowed in favor of the parties named as entitled thereto," the attorney general has held that the secretary "has no discretion as to the amount and is required by the ex-

This is but a logical application of the doctrine already established in *State v. Hastings*. Although during the period when payments were often authorized to be made from the state treasury without the secretary's warrant[49] sometimes the audit of some other officer, generally the governor, was substituted,[50] by 1858 the constitutional position of the auditor was sufficiently appreciated to prevent any further attempts at such direct encroachments upon his power.[51] But when that year the auditor's power was increased by the substitution of his audit of certain claims against the state for the former special legislative appropriations,[52] it was considered unwise to leave him without some administrative check, in consideration of "the accumulated and multifarious duties and responsibilities" then resting upon him and the carelessness which had characterized the conduct of his office,[53] and hence virtually an additional auditor was provided for under the title of comptroller.[54] The comptroller was to examine and pass upon all claims audited by the secretary and to countersign all his warrants on the state treasurer. The requirements were held to be unconstitutional by the supreme court in *State v. Hastings*,[55] as providing a veto on the acts of the secretary, and thus creating two auditors instead of one as contem-

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press provisions of the statute to draw his warrant for the amount." *Report of Attorney General*, 1906, pp. 73–4. See also *above*, p. 35. And there is perhaps an attempt to encroach upon the auditor's power in a law of 1901 (ch. 433, sec. 4), which provides that "the certificate of the proper officers of the board of regents of the normal schools, the regents of the University of Wisconsin, the state board of control, or the proper officers of any other board or commission organized or established by the state, shall in all cases be evidence of the correctness of any account which may be certified by them."

The terms "audit" and "warrant" when used to confer authority upon officers other than the secretary of state must be construed to indicate merely a preliminary approval. This was recognized by the legislature in 1878, by substituting in the *Revised Statutes* of that year in most such cases "approve" and "certificate" for "audit" and "warrant" respectively.

[49] *Below*, pp. 46–7.

[50] *E. g., Laws*, 1849, ch. 161, sec. 19; *Laws*, 1851, ch. 306, sec. 5; *Laws*, 1854, ch. 85.

[51] *Cf. Senate Journal*, 1854, p. 287.

[52] *Laws*, 1858, chs. 1, 114. *Cf. above*, p. 43, note 42.

[53] *Report of the Joint Committtee of Investigation into the Affairs of the Several State Departments*, 1858, pp. 4–5. 8; *Wisconsin State Journal*, Aug. 25, 1859.

[54] *Laws*, 1858, ch. 155.

[55] 10 *Wis.* 525 (1860). See also *Daily Wisconsin Patriot*, Mar. 3, 1859. The office was abolished by *Laws*, 1860, ch. 80, sec. 2.

plated by the constitution. Moreover, the court went beyond the particular law in question, and declared that the functions of the auditor "cannot in whole or in part, be transferred to, or be exercised, concurrently or otherwise, by any other person or officer," and being a personal trust, cannot be delegated even to the assistant secretary,[56] who since 1854 had been authorized by statute to act for the secretary in this capacity.[57] But with the increasing burden imposed upon the secretary it has been absolutely impossible for him personally to audit all claims against the state, and in practice most of the actual auditing is done by one of the clerks in his office in the name of the secretary. However, until 1907 the secretary was compelled at least personally to sign all warrants issued. A law of that year relieves him of what in most cases could be only a perfunctory act by providing that "whenever for any reason it shall be impracticable for the secretary of state to sign his name personally to the warrants issued on the state treasury he may in his discretion designate some one in his department to sign his name to said warrants."[58]

3. The practice for many years of providing for payments from the treasury without the secretary's warrant did not finally cease until 1866. The *Statutes* of 1839 direct that no money shall be paid by the treasurer except upon the auditor's warrant.[59] This provision was re-enacted when the secretary of

[56] Suggestions have been made at various times for an amendment of the constitution so as to allow the establishment of the separate office of auditor. *Message and Documents*, 1865, p. 81; *Assembly Journal*, 1866, pp. 30-1; *Wisconsin State Journal*, Jan. 16, 1873; *Report of Secretary of State*, 1877, pp. 70-2.

[57] *Laws*, 1854, ch. 65, sec. 1. Contrast *Revised Statutes*, 1849, ch. 9, sec. 12.

[58] *Laws*, 1907, st. 146. The attorney general had rendered an opinion to the effect that the secretary, then afflicted with defective vision, might have warrants signed by another in his presence, but only upon a statement by the secretary, filed with each batch of warrants so signed, that another had signed them, and that the secretary on account of this disability had been unable to sign them himself. *Wisconsin State Journal*, Jan. 19, 1907. The secretary had pointed out that the signing of warrants had become an onerous clerical function, consuming much time which should have been devoted to other duties of the office. *Ibid.*

[59] *Statutes*, 1839, p. 81, sec. 5.

state became auditor,[60] but was omitted from the *Revised Statutes* of 1849, for what reason it is not certain.[60a] Those statutes recognize two methods of payment by the state treasurer, payment upon direct appropriation, and payment upon the auditor's warrant. The treasurer "shall pay no moneys out of the treasury except in pursuance of a law authorizing the payment thereof; but when any claim or account is authorized by law to be paid out of a general or contingent appropriation, the same shall be paid by the treasurer upon the certificate of the secretary of state."[61] Even before the change of 1849 payments had at times been ordered made without the auditor's warrant, thus leaving him without any check whatever on the treasurer's disbursements in such cases.[62] But in 1866 a provision similar to that abolished in 1849 was enacted, requiring all payments from the treasury to be made upon the warrant of the secretary of state.[63]

4. When money is paid by the state treasurer, even upon the warrant of the secretary of state, to an officer, to be disbursed by the latter, the secretary has no real control of such state expenditures. This is best illustrated by the position occupied until very recently by the state charitable and penal institutions. Until 1895, upon estimates made by the proper authorities of these institutions (now the state board of control), the secretary

[60] *Laws, June,* 1848, p. 13, sec. 3; p. 115, sec. 10 (9).

[60a] The governor was convinced that the secretary's warrants were evidence of state indebtedness and hence prohibited by the constitution. For this reason and to prevent double issues or forged warrants, he recommends the "repeal of all laws authorizing the issuing of warrants or other orders on the state treasury, and that provisions be made by law requiring the treasurer to pay on appropriation only, which, with proper vouchers, is the most effective check upon his disbursements." But this view seems to have met with little sympathy. *Senate Journal,* 1849, pp. 19-20, 141-2; *Madison Express,* Feb. 6, 1849: *Wisconsin Argus,* Feb. 6, 1849; *Laws,* 1849, ch. 22.

[61] *Revised Statutes,* 1849, ch. 9, sec. 28 (2).

[62] *Cf. House Journal,* 1841-2, p. 495; *Council Journal,* 1842-3, *appendix,* p. 44; *Report of Secretary of State,* 1865, pp. 78-81.

[63] *Laws,* 1866, ch. 3; *Revised Statutes,* 1878, sec. 146; *Revised Statutes,* 1898, secs. 146, 157 (2). See also *Laws,* 1865, ch. 285; *Laws,* 1869, ch. 32. It should also be noted that the school fund income and school tax were apportioned without any action of the auditor until 1866. *Laws,* June, 1848, p. 226, sec. 104; *Revised Statutes,* 1849, ch. 9, sec. 53. But since 1866 the superintendent has certified the apportionment to the secretary of state, and the latter has drawn his warrants in favor of the county. *Laws,* 1866, ch. 4; *Revised Satutes,* 1898, sec. 555.

of state drew warrants on the state treasurer, and the latter paid out the money on the demand of the treasurers of the respective institutions.[64] But the secretary seems to have insisted that he had a constitutional right to audit all such expenditures,[65] and this right was recognized by a law passed in 1895. That provision directs that all bills of the board of control shall be certified to and filed with the secretary of state, who shall audit them, and draw warrants on the state treasurer and deliver them to the secretary of the board, to be distributed by him to the claimants.[66] This was the beginning of the system of "central audit."

The university and the normal schools were still absolutely independent of the auditor, who did not even draw a formal warrant for the payments to these institutions. Until a few years ago the income of the university fund was either drawn directly from the state treasury by the regents of the university, or placed wholly at their disposal by transfer to the treasurer of the regents,[67] thus leaving the auditor, except during the few years while he acted as secretary of the board,[68] without any record whatever of the expenditures of the income.[69] Until 1878 the warrants of the board of regents of the normal schools for the annual apportionments from the normal school fund to the several institutions under their control were countersigned by the secretary of state,[70] but legislation of that year[71] made the regents of the normal schools also "a sort of star chamber body,"[72] by transferring the entire income to the treasurer of the board.[73] For a few years both boards were required to file quarterly

[64] *Laws*, 1878, ch. 338; *Annotated Statutes*, sec. 172, note; *Laws*, 1881, ch. 298, secs. 13-5.

[65] *Wisconsin State Journal*, Jan. 23, 1895.

[66] *Laws*, 1895, ch. 202, sec. 6; *Revised Statutes*, 1898, sec. 561a.

[67] *Laws*, 1854, ch. 81, sec. 6; *Private and Local Laws*, 1857, ch. 341; *Laws*, 1866, ch. 114, sec. 13; *Laws*, 1870, ch. 80, sec. 2. *Cf. Senate Journal*, 1856, pp. 431-3; *Senate Journal*, 1858, pp. 991-4.

[68] *Laws*, 1866, ch. 114, sec. 10; *Laws*, 1869, ch. 13.

[69] *Report of Secretary of State*, 1870, p. 10.

[70] *Laws*, 1857, ch. 82, sec. 12.

[71] *Laws*, 1878, ch. 227.

[72] *Wisconsin State Journal*, Jan. 23, 1895.

[73] Payments from certain other funds of the normal schools were actually audited by the secretary of state from 1866 to 1879. *Laws*, 1866, ch. 116, sec. 3; *Laws*, 1879, ch. 98.

itemized statements of expenditures with the auditor,[74] but even this check was removed in 1898.[75] Such was the unsatisfactory condition of affairs when the system of "central audit" was extended in 1900.

Such a system had been advocated for at least forty years before the legislation of 1900.[76] In 1899 a commission was appointed by authority of law to adopt a uniform system for "keeping the books and accounts of the state" for "all the state offices and departments to which it shall be applicable."[77] The plan adopted by the commission conflicted with the statutory provisions above described in reference to the university and the normal schools, but the attorney general was of the opinion that the regulations made by the commission should prevail over the statutes on account of the constitutional authority of the auditor.[78] However, the commission's action was ratified by law the next year.[79] The plan includes "every board, society, commission, association, . . . and every office, agent, or employe thereof or of the state, who by virtue of his office receives, collects or disburses any money." All bills of all of the foregoing must be passed upon by the auditor (itemized vouchers being expressly required in every case) before he draws his warrant. All state moneys are to be paid into the state treasury, and all disbursements to be made, on the auditor's warrant, directly to the claimant by the state treasurer.[80]

5. But the auditor's control over expenditures is not yet absolutely complete. Where the fee system, now in most instances

[74] *Laws*, 1895, ch. 296, sec. 2.

[75] *Revised Statutes*, 1898, secs. 383a, 401, note.

[76] *Governor's Message*, 1863, p. XV; *Report of Secretary of State*, 1865, pp. 80–1; *Report of Secretary of State*, 1866, p. 33; *Assembly Journal*, 1866, pp. 30–1; *Report of Secretary of State*, 1877, p. 72; *Wisconsin State Journal*, Jan. 23, Feb. 7, 1895; *Senate Journal*, 1899, p. 32; *Wisconsin State Journal*, Apr. 13, 1900.

[77] *Laws*, 1899, ch. 133.

[78] *Wisconsin State Journal*, Apr. 13, 1900; *Assembly Journal*, 1901, pp. 661–2.

[79] *Laws*, 1901, ch. 433, sec. 3.

[80] *Wisconsin State Journal*, Apr. 13, 1900; *Laws*, 1901, ch. 433; *Laws*, 1903, ch. 260. The system is held to apply only to state offices and institutions and not to the various voluntary associations receiving state moneys. *Report of Attorney General*, 1904, pp. 302–4, 308–9, 422–6.

abolished, prevails, and expenses of office are paid directly from these receipts, the auditor has no authority whatever.[81]

There are no constitutional or statutory provisions in reference to the finality of the auditor's action, but it has been settled by the supreme court in *State v. Hastings*[82] that "wherever there has been an appropriation made and power is given by law to the secretary to adjust and determine the amount of the claims to be paid, his decision is final; and it is not for the [state] treasurer or any one else to revise or correct his action."

It is apparent that the constitutional position which gives the secretary of state such control over the expenditures of other officers itself prevents any similar control over the expenditures of his own office.[83]

Accounts with Receivers of State Moneys. The auditor has always kept an account with the treasurer, all the treasurer's receipts being countersigned and recorded by him;[84] but of course when the practice prevailed of allowing payments to be made from the treasury without the auditor's warrants, any complete account was impossible.[85] The auditor also examines the accounts and funds of the treasury quarterly, and reports his findings to the governor,[86] and the state depositories are required to report to the auditor at stated intervals as well as on demand.[87] Until recently there was no provision for the secretary's countersigning receipts for moneys collected by any other

[81] *E. g., Laws,* 1870, ch. 56; *Revised Statutes,* 1898, sec. 1968; —— *Laws,* 1903, ch. 191, sec. 4. *Cf. Assembly Journal,* 1897, pp. 848-51; *Report of Commissioner of Insurance* (*Life and Casuality*), 1904, pp. 38-41; *Wisconsin State Journal,* June 10, 1905. For recommendations of further legislation for the administrative control of state expenditures see *Governor's Message,* 1905, pp. 5-8; 1907, p. 44.

[82] 10 *Wis.* 525, 537 (1860).

[83] For the first year after the organization of the state the secretary's salary was paid by the state treasurer on the *certificate* of the governor. *Laws,* June, 1848, p. 115, sec. 34; *Revised Statutes,* 1849, ch. 9, sec. 25.

[84] *Statutes,* 1839, p. 81, secs. 4-5; *Revised Statutes,* 1898, secs. 144 (3-4), 157 (4); *Laws,* 1901, ch. 433.

[85] *Cf. House Journal,* 1841-2, p. 495; *Council Journal,* 1842-3, appendix, p. 44; *Report of Secretary of State,* 1865, pp. 78-81.

[86] *Revised Statutes,* 1849, ch. 9, sec. 19 (4); *Revised Statutes,* 1878, sec. 144 (5); *Revised Statutes,* 1898, sec. 144 (5).

[87] *Laws,* 1891, ch. 273, sec. 7; *Laws,* 1907, st. 160 f. See also *Laws,* June, 1848, p. 115, sec. 11; *Revised Statutes,* 1898, sec. 149.

officer than the state treasurer, and hence the secretary had no check on such collections.[88] Under the present system of accounting, treasurer's receipts are given in all cases of payments into the treasury, directly or indirectly, and are countersigned by the secretary of state.[89]

Auditor's Books and Reports. The auditor has been required to keep accounts of the receipts and expenditures of the public funds and to make complete statements thereof at specified times to the legislature or the governor.[90]

3. CONTROL OTHER THAN FINANCIAL OVER STATE OFFICERS

The secretary of state has also exercised some administrative control, other than financial, over a few state officers. He has been authorized to approve the official bonds of some officers;[91] either alone or with another officer, and to approve or direct administrative acts in a few cases, and some state officers have been required to make reports to him.

4. MISCELLANEOUS FUNCTIONS

Finally the secretary has also performed various miscellaneous duties, of which some will be mentioned. As has been indicated above, after the lieutenant governor, he is next in succession to

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[88] *Senate Journal,* 1899, pp. 32–3; *Assembly Journal,* 1901, pp. 1172–3.

[89] *Wisconsin State Journal,* Apr. 13, 1900; *Laws,* 1901, ch. 433.

[90] *Statutes,* 1839, p. 81, sec. 4; *Laws,* June, 1848, ch. 115, sec. 10 (4); *Laws,* 1883, ch. 320, sec. 1; *Revised Statutes,* 1898, secs. 144 (13), 335a.

The Fiscal Agent. During the territorial period annual appropriations were made by Congress to be expended by the secretary of the territory in defraying certain expenses of the territory. *Organic Law,* sec. 11. All accounts for disbursements were settled by the United States treasury. *Act of Congress,* Aug. 29, 1842, ch. 259, sec. 2, 5 *Stat. L.* 540. *Cf. Council Journal,* 1842–3, pp. 229–31. After 1841 the secretary reported the expenditures to the legislative assembly. *Laws,* 1840–1, No. 28, sec. 4. In the earlier years, because congress did not make these appropriations in advance, the assembly annually appointed a fiscal agent to advance money, and he was authorized to reimburse himself by drawing on the United States treasury. *E. g., Laws,* 1836, p. 81; *Laws,* 1839–40, Resolutions, Nos. 4, 9. But the legality of making payments to the agent was questioned in 1840 (*House Journal,* 1840–1, pp. 64, 67–8, 95; appendix, pp. 72–95; *Wisconsin Enquirer,* Sept. 22, 1841), and the office abolished. *Laws,* 1840–1, Resolution, No. 11.

[91] *E. g., Laws,* 1861, ch. 198, sec. 6; *Laws,* 1907, st. 346.

the office of the governor. He has been an *ex officio* member of many state boards, and now serves on several important boards.[92] Under the general incorporation laws, corporations have been chartered usually by the secretary, although more recently those under the control of other officers are chartered by them. The collection of statistics, with the exception of the census,[93] later permanently placed under his supervision,[94] began in the office of the secretary.[95] Since 1878 various brands and trade-marks may be filed in his office.[96] The secretary's duties in connection with the administration of taxation and elections and publication of state documents are considered elsewhere.[97] Since the constitution requires the publication of all general laws—the statutes add certain other laws—before they go into effect,[98] the secretary's publication[99] is in the nature of a promulgation of the laws.[100] The state administration of education began with the requirement of reports from the local authorities to the secretary,[101] and the department of insurance had its beginning in his office.[102] In addition to his financial reports, the secretary has always made a general report of the transactions of his office to the governor or the legislature.[103]

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[92] *E. g., below,* pp. 55–6, 64. 68, 70, 78–80, 96.

[93] *E. g., Organic Law,* sec. 4.

[94] *Revised Statutes,* 1878, sec. 992; *Revised Statutes,* 1898, sec. 992.

[95] *E. g., Township and County Government Act,* 1840–1, ch. 8, pt. 1, sec. 8.

[96] *Laws,* 1878, ch. 302, sec. 1; *Laws,* 1893, ch. 104, sec. 1; *Revised Statutes,* secs. 1747a, 1747d; *Laws,* 1901, ch. 360, sec. 1.

[97] *Below,* pp. 77–81, 84, 89–98, 102–5.

[98] *Constitution,* Art. VII, sec. 21; *Laws,* 1874, ch. 243, sec. 26; *Revised Statutes,* 1898, sec. 329.

[99] *Below,* p. 104.

[100] With the exception of corrections of manifest errors in spelling and grammar, which the secretary is expressly authorized by statute to make (*Laws,* 1864, ch. 411, sec. 2; *Revised Statutes,* 1898, sec. 343) he has no discretion in the matter, but must publish the laws as they come to him. *State v. Wendler,* 94 *Wis.* 369, 373 (1896).

[101] *Township and County Government Act,* 1840–1, ch. 8, part 1, sec. 8; *Laws,* June, 1848, p. 226, sec. 98.

[102] *Laws,* 1850, ch. 232; *Laws,* 1870, ch. 56; *Laws,* 1878, ch. 214.

[103] *Laws,* 1840–1, No. 28, sec. 4; *Revised Statutes,* 1849, ch. 9, sec. 10 (4); *Revised Statutes,* 1898, sec. 141 (4).

CHAPTER III

THE STATE TREASURER

I. The Organization of the Treasurer's Office. II. The Functions of the Treasurer. *Custody of State Moneys and Securities.—Control over Other State Officers.—Miscellaneous Functions.*

I. The Organization of the Treasurer's Office

Until the legislative assembly in 1839 passed an act relative to the territorial treasurer,[1] this office owed its existence to an adopted law of Michigan.[2]

Appointed by the governor and council until 1848, the treasurer has since been elected by the people, the term of office always being two years.[3] The bond of ten thousand dollars required of the territorial treasurer became one hundred thousand dollars for the state treasurer, in both cases approved by the governor.[4] The governor of the territory might increase the amount of the bond required at any time and to any extent,[5] and an act of 1848 provides that whenever the funds in the treasury exceed three-fourths of the treasurer's bond, or whenever for any cause the governor deems the security insufficient, he shall require the treasurer to give an additional bond in such "reasonable amount" as the governor may determine.[6] But

[1] *Statutes*, 1839, p. 80.

[2] *Organic Law*, sec. 12; *Michigan Laws Condensed*, 1833, p. 174; *House Journal*, 1836, p. 70.

[3] *Statutes*, 1839, p. 80, sec. 1; *Constitution*, Art. VI, sec. 1.

[4] *Statutes*, 1839, p. 80, secs. 2-3; *Laws*, June, 1848, p. 13, sec. 2; *Laws*, 1905, ch. 271, sec. 1.

[5] *Statutes*, 1839, p. 80, sec. 2.

[6] *Laws*, June, 1848, p. 13, sec. 4.

thirty years later the provision of three-fourths of the amount of the bond was modified to the full amount, and since that time the governor has been unable to demand an amount above the amount of the funds in the treasury.[7]

The treasurer's salary, only sixty dollars in 1839,[8] was gradually increased to fourteen hundred dollars in 1856,[9] and to five thousand dollars twenty years later.[10] In addition the treasurer retained all fees received in his office until 1859, when he was required by law to pay into the state treasury all fees received during each year above the total amount of two thousand dollars.[11] Since the salary was so largely increased in 1876 he has been required to pay all such fees into the treasury and to make a report of all fees received to the secretary of state.[12] Still another large source of the treasurer's income was cut off in 1891. For thirty years previous to that time[13] it had been the custom of the state treasurers to retain for their own benefit[14] the interest received on state moneys deposited in banks.[15] But after considerable agitation in 1891[16] the matter was brought before the courts, and it was decided in *State v. McFetridge*[17] that the title to the moneys deposited with the treasurer vests in the state and that the interest belongs to the state. A law of 1891 had already directed the treasurer to pay into the treasury and account for all moneys whatever received by him by virtue of his office.[18]

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[7] *Revised Statutes,* 1878, sec. 154; *Revised Statutes,* 1898, sec. 154.

[8] *Statutes,* 1839, p. 80, sec. 5.

[9] *Laws,* 1846, p. 198, sec. 2; *Laws,* June, 1848, p. 13, sec. 7; *Laws,* 1856, ch. 82.

[10] *Laws,* 1876, ch. 341, sec. 3; *Laws,* 1907, st. 170 (3).

[11] *Laws,* 1859, ch. 189.

[12] *Laws,* 1876, ch. 341, sec. 3.

[13] The practice apparently existed, at times at least, as early as 1855. *Senate Journal,* 1855, p. 267; *Assembly Journal,* 1855, p. 394.

[14] It is said that during at least part of the time the interest thus received was regularly paid into party campaign funds.

[15] *State v. McFetridge,* 84 *Wis.* 473 (1893). For the years 1874 and 1875 the treasurer received between twenty-four thousand and twenty-five thousand dollars as interest on deposits of state funds. *Ibid.,* 525.

[16] *Governor's Message,* 1891, pp. 9-12.

[17] 84 *Wis.* 473 (1893).

[18] *Laws,* 1891, ch. 273, sec. 11; *Revised Statutes,* 1898, sec. 157 (12). Special courtesies extended to the treasurer by the state depositories have been charged as another source of profit. *E. g., Wisconsin State Journal,* Aug. 25, 1904.

The office of assistant state treasurer was created in 1854. His bonds are determined in amount and approved by the treasurer. He may perform any of the duties of the treasurer except as commissioner of public lands.[19] Permanent provision for clerks in the treasurer's office was first made in 1851, when he was authorized to employ the necessary clerks, but was restricted to a certain amount of expenditure for the purpose.[20] This provision was repealed a few years later when the office of assistant treasurer was established.[21] From 1859 to 1897 the treasurer was absolutely unrestricted as to the number of clerks appointed and the amount of their compensation, but since 1897 both clerkships and compensation have been determined by statute.[22]

II. The Functions of the Treasurer

Custody of State Moneys and Securities. The law of 1848 expresses the chief function the treasurer, to "receive and have charge of all money paid into the state treasury"[23] The statutes direct that all securities belonging to the state shall be deposited with the secretary of state, unless otherwise provided;[24] but by special provisions the treasurer has been entrusted with the custody of most of them.

After the agitation of 1891 about the interest on deposits, state depositories were provided for. These are banks approved by a board of deposits, consisting of the governor, secretary of

[19] *Laws*, 1854, ch. 65, sec. 1; *Revised Statutes*, 1898, sec. 155. See *Daily Argus and Democrat*, Mar. 11, 1854.

[20] *Laws*, 1851, ch. 389; *Laws*, 1852, ch. 256.

[21] *Laws*, 1854, ch. 78, sec. 3.

[22] *Laws*, 1859, ch. 144; *Laws*, 1897, ch. 355; *Revised Statutes*, 1898, sec. 156; *Laws*, 1907, st. 170 (2). The power of bondsmen in the organization of such a department is illustrated by a proposition of a treasurer's bond to be given by a surety company in consideration of an agreement with the treasurer that the company should direct the appointment of all assistants and clerks in the office, and that the treasurer should suffer the imposition of certain other conditions. *Report of Attorney General*, 1906, pp. 192-3 (1904).

[23] *Laws*, June, 1848, p. 13, sec. 1; *Revised Statutes*, 1898, sec. 152. See *State v. McFetridge*, 84 *Wis.*, 473, 512 (1893).

[24] *Laws*, June, 1848, p. 115, secs. 3, 16; *Revised Statutes*, 1849, ch. 9, sec. 11; *Revised Statutes*, 1898, sec. 142.

state, state treasurer, and attorney general. The board, subject to certain limitations, determines the rate of interest to be paid on the money deposited in such banks by the state treasurer. The depositories make reports at stated intervals to the secretary of state.[25] The board may require the commissioner of banking to investigate and report upon the condition of a bank making application to become a depository, and to examine and report the condition of any of the depositories.[26]

The treasurer pays out money according to law,[27] keeps an account with the auditor, and files statements of receipts and expenditures with him.[28]

The *Revised Statutes* of 1878 make it the special duty of the state treasurer to cause action to be brought against officers and sureties for breach of official bonds by neglect to pay over state moneys received.[29]

In addition to the control over the treasurer exercised by the auditor,[30] since 1876 the governor and attorney general have been directed, at least once a quarter and at such other times as the governor may elect, to make examination and to ascertain whether all funds shown by the books of the auditor and the treasurer to belong to the state are in the vaults of the treasury or in the depositories, and in case of a deficiency, to require the treasurer immediately to make it good.[31]

Control over Other State Officers. In a few instances other officers of the state administration have been subject to control by the treasurer, through his appointment,[32] or direction,[33] or approval of action.[34]

[25] *Laws*, 1891, ch. 273, secs. 1-7; *Revised Statutes*, 1898, sec. 160c; *Laws*, 1903, ch. 233; *Laws*, 1907, st. 160 f.

[26] *Revised Statutes*, 1898, sec. 160b; *Laws*, 1903, ch. 233.

[27] *Statutes*, 1839, p. 80, sec. 4; *Revised Statutes*, 1898, sec. 157 (2). See *State v. McFetridge*, 84 *Wis.* 473, 511 (1893). *Cf. above*, pp. 42-50.

[28] *Laws*, June, 1848, p. 13, sec. 3; *Laws*, 1876, ch. 341, sec. 4; *Revised Statutes*, 1898, sec. 157 (1, 10).

[29] *Annotated Statutes*, sec. 984 and note; *Revised Statutes*, 1898, sec. 984. *Cf. State v. Pederson*, **114 *N. W.* (Wis.) 828** (1908).

[30] *Above*, pp. 41-50.

[31] *Laws*, 1876, ch. 340, sec. 5; *Laws*, 1891, ch. 273, sec. 12; *Revised Statutes*, 1898, sec. 159.

[32] *Laws*, 1895, ch. 291, sec. 1; *Laws*, 1903, ch. 234 (ch. 1), sec. 2.

[33] *E. g.*, *Laws*, 1901, ch. 466, sec. 1.

[34] *E. g.*, *Revised Statutes*, 1878, sec. 131; *Laws*, 1907, st. 131.

Miscellaneous Functions. The treasurer has been an *ex officio* member of many important state boards,[35] but in addition to this, his miscellaneous duties of importance have been very few. He was formerly state sealer of weights and measures,[36] and from 1870 to 1903 performed the duties of bank comptroller.[37] His duties in connection with the administration of taxation are described elsewhere.[38] Reports of receipts and expenditures, etc., have always been required of the treasurer to the legislature or the governor.[39]

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[35] *E. g., below,* pp. 68, 70, 78–9, 96, 102–3.

[36] *Statutes,* 1839, p. 175, secs. 15–16, 18; *Laws,* 1885, ch. 181.

[37] *Laws,* 1868, ch. 28, secs. 2–3; *Laws,* 1903, ch. 234.

[38] *Below,* pp. 81, 84–91.

[39] *Statutes,* 1839, p. 80, sec. 4; *Laws,* June, 1848, p. 13, sec. 3; *Revised Statutes,* 1898, sec. 157 (7–8).

CHAPTER IV

THE ATTORNEY GENERAL

I. The Organization of the Attorney General's Office. II. The Functions of the Attorney General. *Prosecution and Defense of Suits for the State.—Assistance to the Legislature and to Executive Officers.—Miscellaneous Functions.*

I. The Organization of the Attorney General's Office

The legislative assembly made no provision for this office until 1839, but it had previously existed under a law adopted from Michigan.[1]

The attorney general held his appointment from the governor and council until 1848, but has since been elected by the people, serving three years during the territorial period and two years under the constitution.[2] Since 1848 he has been required to give a bond for ten thousand dollars, approved by the governor. The legislature in 1848 expressly reserved the right to increase the amount of the bond at any time, and the next year gave that power also to the governor.[3] At first the salary was fixed by law at two hundred and fifty dollars,[4] but from 1843 to 1846 it was such amount as the legislative assembly might "think proper" (one of the very few instances of such legislative control).[5] From 1846 to 1876 the salary gradually increased from two hundred and fifty to three thousand dollars, and in 1907 be-

[1] *Organic Law*, sec. 12; *Michigan Laws Condensed*, 1833, p. 225, sec. 1; *House Journal*, 1837-8, pp. 192-3.

[2] *Statutes*, 1839, p. 94, sec. 1; *Constitution*, Art. VI, sec. 1.

[3] *Laws*, June, 1848, p. 10, secs. 6-7; *Revised Statutes*, 1849, ch. 9, sec. 42; *Revised Statutes*, 1898, sec. 161.

[4] *Statutes*, 1839, p. 94, sec. 1.

[5] *Laws*, 1842-3, p. 28, sec. 2.

came five thousand dollars.[6] After 1859 the attorney general was required to pay into the state treasury all fees received above two thousand dollars a year,[7] and this provision was extended, when the salary was increased in 1876, to include all fees whatever, with a requirement of a report of all receipts to the secretary of state.[8]

In 1857 the attorney general was authorized to appoint an "assistant" in his office,[9] but the latter does not seem to have been regarded as an assistant attorney general,[10] a title not adopted until 1878.[11] Two other assistant attorneys general have since been added to the department,[12] and in 1907 the office of deputy attorney general was created. All of these subordinates have been appointed by the attorney general. In the absence or disability of the attorney general any of his duties may be performed by the deputy. The latter's bond is approved, not by the attorney general, but by the governor.[13] The salaries of the assistants and deputy, determined by law, now range from two thousand to thirty-six hundred dollars.[14] In addition to these officers, the attorney general has the occasional assistance of special counsel. For a few years following 1846 such employment of additional counsel was forbidden by law,[15] but since 1849 such employment has been authorized to be made by the governor alone, the governor with the approval of the secretary of state and state treasurer, and last, by the governor and attorney general, or when the attorney general has an interest in the suit, by the governor alone.[16]

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[6] *Laws*, 1846, p. 200; *Laws*, June, 1848, p. 10, sec. 8; *Laws*, 1861, ch. 194, secs. 1-2; *Laws*, 1876, ch. 341, sec. 1; *Laws*, 1907, st. 170a.

[7] *Laws*, 1859, ch. 189.

[8] *Laws*, 1876, ch. 341, secs. 1, 4; *Revised Statutes*, 1898, sec. 163 (9).

[9] *Laws*, 1857, ch. 101.

[10] *Assembly Journal*, 1864, p. 797.

[11] *Revised Statutes*, 1878, sec. 162.

[12] *Laws*, 1897, ch. 355; *Laws*, 1907, st. 162.

[13] *Laws*, 1907, st. 162.

[14] *Laws*, 1907, st. 170a.

[15] *Laws*, 1846, p. 193, sec. 3.

[16] *Revised Statutes*, 1849, ch. 9, sec. 2; *Revised Statutes*, 1878, sec. 131; *Laws*, 1907, st. 131. Such a provision will always be necessary on account of important cases which require the services of the ablest lawyers. *Cf. Senate Journal*, 1905, pp. 1661-2; *Wisconsin State Journal*, Apr. 18, 20, 1908.

There was no permanent provision for clerkships in the attorney general's office until 1897, but since then he has been allowed a limited number of clerks whose compensation is fixed by law.[17]

II. The Functions of the Attorney General

Prosecution and Defense of Suits for the State. The attorney general of the territory was required to prosecute and defend respectively all suits for and against the territory.[18] The attorney general of the state appears for the state in the supreme court in all cases in which the state is interested,[19] and when requested by the governor or by either house of the legislature, must appear in any court or before any officer in any case in which the state may be interested.[20] In very numerous specified instances of breach of law he is also required by statute to prosecute actions in the various courts and in some other instances to prosecute actions upon the request of other state officers.[21] So in the review of the assessment of certain public service corporations by the tax commission, the attorney general must be present and represent the interests of the state.[22]

The attorney general's position in certain *quo warranto* proceedings deserves special mention. The *Revised Statutes* of 1849 provide that an information in the nature of a *quo warranto* may be filed by the attorney general against individuals, upon his own relation or upon the relation of a private party in certain cases, including, "whenever any public officer . . . shall have done or suffered any act, which by the provisions of law shall work a forfeiture of his office."[23] While yet there

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[17] *Laws*, 1897, ch. 355; *Laws*, 1907, sts. 162, 170a.

[18] *Statutes*, 1839, p. 94, sec. 1.

[19] *Laws*, June, 1848, p. 10, sec. 1; *Laws*, 1861, ch. 194, sec. 4; *Revised Statutes*, 1898, sec. 163 (1).

[20] *Laws*, June, 1848, p. 10, sec. 2; *Revised Statutes*, 1849, ch. 9, sec. 36; *Revised Statutes*, 1898, sec. 163 (1).

[21] *E. g.*, *Revised Statutes*, 1849, ch. 9, sec. 37; *Revised Statutes*, 1898, sec. 163 (2); *Annotated Statutes*, sec. 984 and note; *Revised Statutes*, 1898, sec. 984. See also *below*, pp. 82–3, 92.

[22] *Laws*, 1903, ch. 315, sec. 10; *Laws*, 1905, ch. 493, secs. 11, 20; ch. 494, secs. 11, 20.

[23] *Revised Statutes*, 1849, ch. 126, sec. 1; *Revised Statutes*, 1898, sec. 3466.

was no statute on the subject the supreme court, in *United States v. Lockwood,*[24] had intimated, though not decided, in maintaining the necessity of the attorney general's identification with the relation, that he could not withhold his name or sanction when requested in such cases. But in 1855 the attorney general refused to file an information upon the demand of the former occupant of the office of state geologist, who claimed that he had been illegally removed from office by the governor. This was the cause[25] of the enactment of a law in 1855, which removes the possibility of grave abuse of the attorney general's power, by providing that a claimant to office may file an information on his own relation, with or without the consent of the attorney general, and may prosecute the case to final judgment should the latter refuse to act.[26] The attorney general's authority in this matter was further restricted the next year by a decision of the supreme court in *Attorney General v. Barstow,*[27] to the effect that the attorney general will not be allowed to withdraw, after having filed an information, without the consent of the private relator.

Assistance to the Legislature and to Executive Officers. The attorney general has always been required to give his opinion on questions of law submitted by the governor or by the legislature,[28] and the right to submit such questions for his opinion has been extended to each house of the legislature, to the heads of all the state departments, and to several of the state boards.[29] By an act of 1876 the attorney general or an assistant is required to attend meetings of any committee of the legislature considering bills "whose object is to secure the payment of money by the state," and to give counsel as to the liability of the state for the amounts in question.[30] The attorney general of the territory had no relations with the district attorneys, but since the organization of the state the attorney general has been

[24] 1 *Pinney,* 359, 363 (1843).

[25] *Wisconsin State Journal,* Feb. 21, 1855.

[26] *Laws,* 1855, ch. 23; *Revised Statutes,* 1898, sec. 3466.

[27] 4 *Wis.* 567, 582 (1856).

[28] *Statutes,* 1839, p. 94, sec. 1: *Revised Statutes,* 1898, sec. 163 (4).

[29] *Revised Statutes,* 1849, ch. 9, sec. 38; *Laws,* 1897, ch. 100; *Revised Statutes,* 1898, sec. 163 (4).

[30] *Laws,* 1876, ch. 140; *Revised Statutes,* 1898, sec. 107.

required to advise the district attorneys in all matters pertaining to their duties when requested by them.[31] He prepares proper drafts for contracts, etc., for some of the state officers.[32] Whenever required by the governor, he investigates the affairs of any corporation doing business in the state, for which he has large powers, and reports to the governor.[33] Upon the request of the railroad commission or of the governor, he attends hearings conducted by the commission and aids in the examination of witnesses, etc.[34]

A provision of 1848, repealed the next year, made it the duty of the attorney general, when required by either branch of the legislature, to attend the session and "give his aid and advice in the arrangement and preparation of legislative documents and business,"[35] a function of the state administration recently revived in the assistance given the members of the legislature by the legislative reference department of the free library commission.[36]

Miscellaneous Functions. Among the few important miscellaneous functions of the attorney general should be mentioned his approval of the administrative acts of some officers[37] and his connection with various important state boards.[38] Until 1901, with the exception of one year after the state was organized,[39] the attorney general was not required to report to the legislature or to the governor, although he had been required to keep a register of the actions, etc., prosecuted or defended for the state.[40] Since 1901 he has reported to the governor on all matters pertaining to his office, including the substance of legal opinions rendered by him on questions of public importance.[41]

[31] *Laws*, June, 1848, p. 10, sec. 3; *Revised Statutes*, 1898, sec. 163 (3).
[32] *Revised Statutes*, 1849, ch. 9, sec. 39; *Revised Statutes*, 1898, sec. 163 (5).
[33] *Revised Statutes*, 1849, ch. 54, sec. 22; *Revised Statutes*, 1898, sec. 1766.
[34] *Laws*, 1903, ch. 431, sec. 1 (1796c).
[35] *Laws*, June, 1848, p. 10, sec. 4; *Revised Statutes*, 1849, sec. 9.
[36] *Below*, p. 65.
[37] *E. g., Laws*, 1880, ch. 289, sec. 3; *Revised Statutes*, 1898, sec. 563; *Laws*, 1903, ch. 44, sec. 21.
[38] *E. g., above*, p. 56; *below*, pp. 64, 70, 78–9, 102.
[39] *Laws*, June, 1848, p. 10, sec. 3; *Revised Statutes*, 1849, ch. 9.
[40] *Revised Statutes*, 1849, ch. 9, sec. 41; *Revised Statutes*, 1898, sec. 163 (7).
[41] *Laws*, 1901, ch. 94, sec. 1. See *Report of Attorney General*, 1855, p. 3; *Assembly Journal*, 1901, p. 53. The provision for the compilation of the opinions of the attorneys general from the organization of the government to the present has not been carried out. *Laws*, 1901, ch. 161, sec. 1.

CHAPTER V

THE ADMINISTRATION OF THE STATE LAW LIBRARY AND OF THE LEGISLATIVE REFERENCE LIBRARY

I. The State Law Library. II. The Legislative Reference Library.

I. The State Law Library

The state law library is intended primarily for the use of the supreme court, the state administration, and the legislature.

An adopted statute of Michigan providing for the appointment of librarian was the only authority for the appointment of such an officer for the territory of Wisconsin previous to 1839, and during part of this period no appointment seems to have been made.[1] An act of the legislative assembly of 1839 established the office of librarian, but his duties at that time included some of those later imposed upon the superintendent of public property.[2] In 1843 the office was abolished and the duties transferred to the newly created office of superintendent of public property,[3] but this was in reality only a change in the name of the office, made solely for the purpose of ousting the then incumbent.[4] A similar motive seems to have been the chief cause of the act of 1849, which abolished the separate office of superintendent, and made the governor *ex officio* superintendent, with the assistance of a librarian.[5] Finally in 1851, the separate office of librarian was again established.[6] But since

[1] *Organic Law,* sec. 12; *Michigan Laws Condensed,* 1833, p. 544; *House Journal,* 1836, p. 55; *Council Journal,* 1837-8, pp. 18, 232-3; *House Journal,* 1837-8, p. 192; *House Journal,* June, 1838, p. 99; *Council Journal,* Nov., 1838, p. 23; *House Journal,* Nov., 1838, p. 24.

[2] *Statutes,* 1839, p. 82, secs. 1-2, 12-3.

[3] *Laws,* 1842-3, p. 14, sec. 4.

[4] *Wisconsin Enquirer,* Apr. 13, 1843. See the governor's objections to the bill in *Council Journal,* 1842-3, pp. 154-5.

[5] *Laws,* 1849, ch. 2, secs. 4, 6; *Wisconsin Express,* Jan. 30, 1849.

[6] *Laws,* 1851, ch. 352.

that time the chief control of the library has not been with the librarian, but with the board of trustees of the state library, consisting, until 1876, of the governor, secretary of state, and state superintendent, and since 1876, of the justices of the supreme court and the attorney general.[7]

The librarian has been appointed by the governor and the council or by the governor alone, for a period of two years, and finally by the trustees during the pleasure of the trustees.[8] The salary has been prescribed by law, by the governor, or by the trustees as at present, and has varied from three hundred dollars in 1839 to two thousand dollars at present.[9] The librarian's bond, at first for one thousand dollars, later determined by the governor, and now ten thousand dollars, was formerly approved by the governor but now by the trustees.[10] From 1839 to 1907, the librarian might appoint an assistant, although for part of the period only with the consent of the governor, and for most of the period only at his own expense;[11] but since 1907 the appointments of assistants and clerks has been left entirely to the discretion of the trustees, who also determine their compensation. However, the total amount for such expenditure, with the librarian's salary, may not exceed four thousand and three hundred dollars a year.[12] The trustees (formerly the governor) also employ the janitors and determine their compensation.[13]

The librarian has had very little discretion in the performance of his duties, for the library has been much regulated by statute and by the governor or the trustees.[14] Permanent provisions

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[7] *Laws*, 1851, ch. 352, sec. 1; *Laws*, 1876, ch. 116; *Revised Statutes*, 1898, sec. 367.

[8] *Statutes*, 1839, p. 82, sec. 1; *Laws*, 1849, ch. 2, sec. 2; *Revised Statutes*, 1878, sec. 368; *Laws*, 1907, st. 368.

[9] *Statutes*, 1839, p. 82, sec. 3; *Laws*, 1849, ch. 2; *Laws*, 1851, ch. 352, sec. 6; *Laws*, 1854, ch. 68; *Revised Statutes*, 1858, ch. 10, sec. 10; *Laws*, 1874, ch. 282; *Laws*, 1885, ch. 170; *Laws*, 1907, st. 368.

[10] *Statutes*, 1839, p. 82, sec. 1; *Laws*, 1849, ch. 2, sec. 3; *Laws*, 1851, ch. 352, sec. 5; *Revised Statutes*, 1878, sec. 368; *Laws*, 1907, st. 368.

[11] *Statutes*, 1839, p. 82, sec. 10; *Laws*, 1851, ch. 352, secs. 5-6.

[12] *Laws*, 1907, st. 368.

[13] *Laws*, 1885, ch. 132; *Revised Statutes*, 1898, sec. 2400; *Laws*, 1907, st. 2400.

[14] *Statutes*, 1839, p. 82, secs. 2, 4-9; *Laws*, 1849, ch. 2, sec. 4; *Laws*, 1851, ch. 352, secs. 2-5; *Revised Statutes*, 1878, secs. 368-9, 372; *Revised Statutes*, 1898, secs. 368-9, 372; *Laws*, 1907, st. 372.

for purchases for the library began in 1851. The purchases were made under the direction of the governor at first, but this duty devolved upon the trustees in 1877.[15] Although for twenty years the librarian made regular reports to the legislature, showing the condition of the library, etc., since 1898 he has been required to make no reports whatever,[16] and none has ever been required of the trustees.

II. The Legislative Reference Library[17]

The legislative reference department was established in 1901. It is but one of the several departments in charge of the free library commission, which is composed of the president of the university, state superintendent, and secretary of the state historical society, and two other members appointed by the governor for the term of five years.[18] The department consists of a librarian and various assistants versed in law, government, and economics, drafters of bills, cataloguers, etc., appointed under authority of the commission. The organization of the department is left almost wholly to the discretion of the commission within the limits of the appropriations for the purpose made by the legislature.

The department is primarily a bureau of information for the officers of the state administration and the members of the legislature. All manner of information on subjects of importance to the legislature or the administration is collected, classified, and made easily accessible for the use of the officers and of the members of the legislature. More direct aid to the latter in the drafting of bills is given by experts in the department, and the department has thus become in effect the bill office of the legislature. It will be remembered that more than fifty years before the establishment of this department similar aid to the legislature was given, for a short time, by the attorney general.[19]

[15] *Laws*, 1851, ch. 352, sec. 7; *Laws*, 1877, ch. 177, secs. 1-2, 4; *Revised Statutes*, 1878, sec. 371; *Revised Statutes*, 1898, sec. 371.

[16] *Revised Statutes*, 1878, sec. 372 (8); *Revised Statutes*, 1898, sec. 372.

[17] See account of the library by Dudgeon, in *Yale Review*, Vol. XVI, pp. 288, (1907). The very general provisions of law relating to the department do not give an adequate idea of its nature. *Laws*, 1901, ch. 168; *Laws*, 1903, ch. 238, sec. 1; *Laws*, 1903, ch. 348; *Laws*, 1905, ch. 177; *Laws*, 1907, st. 3731.

[18] *Laws*, 1895, ch. 314, sec. 1; *Laws*, 1903, ch. 348, sec. 1.

[19] *Above*, p. 62.

CHAPTER VI

THE SUPERINTENDENT OF PUBLIC PROPERTY

I. The Organization of the Superintendent's Office.
II. The Functions of the Superintendent.

I. The Organization of the Superintendent's Office

The organization of this office as it existed prior to 1857 has been described above in connection with the state law library.[1] In 1857 the separate office of superintendent of public property was finally established,[2] but, as will appear, the governor exercises so much control over the superintendent that the former is still practically *ex officio* superintendent, as he was expressly declared to be by law for some years before 1857. Previous to 1849 the superintendent was regarded more as an employe of the legislature than as a state officer, and something of his old position still appears in the frequent orders given him by the legislature and by each house. He was at first elected by the legislative assembly to serve until the end of the next session,[3] but since the final establishment of the separate office he has been appointed for the term of two years by the governor.[4] By the law of 1843 his bond of two thousand dollars was approved by the presiding officers of the legislative assembly.[5] In 1857 the amount of the bond was increased to fifteen thousand dollars and made subject to the governor's ap-

[1] *Above*, p. 63.
[2] *Laws*, 1857, ch. 95, See *Assembly Journal*, 1857, p. 800, and *above*, p. 63.
[3] *Laws*, 1842-3, p. 14, sec. 2.
[4] *Laws*, 1857, ch. 95, sec. 1; *Revised Statutes*, 1898, sec. 286.
[5] *Laws*, 1842-3, p. 14, sec. 8.

proval.[6] The superintendent's salary has gradually increased from three hundred to two thousand dollars.[7]

From 1843 until 1849 the superintendent was authorized to appoint an assistant, whose compensation was fixed by law, during the session of the legislature and during the superintendent's necessary absence.[8] From that time until 1897 the superintendent's discretion in the employment and compensation of the "necessary workmen" about the capitol was unrestricted, except that the "advice" of the governor was required during a part of that period,[9] and that since 1866 all claims for labor have been subject to the governor's approval before payment.[10] But in 1897 all positions and their compensation were fixed by law, among them an assistant superintendent at a salary of fifteen hundred dollars,[11] and the next year the governor's consent was made necessary to all appointments.[12] However, since 1899 the superintendent, with the approval of the governor, may add, within a maximum expenditure, such additional help as may be necessary.[13]

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[6] *Laws*, 1857, ch. 95, sec. 2; *Revised Statutes*, 1898, sec. 286.

[7] *Laws*, 1857, ch. 95, sec. 1; *Laws*, 1862, ch. 390: *Laws*, 1864, ch. 228; *Laws*, 1865, ch. 394; *Laws*, 1907, st. 170 (10).

[8] *Laws*, 1842-3, p. 14, sec. 5.

[9] *Laws*, 1849, ch. 2, sec. 2; *Laws*, 1857, ch. 95, sec. 4; *Laws*, 1866, ch. 48, sec. 4.

[10] *Laws*, 1866, ch. 48, sec. 4; *Revised Statutes*, 1898, sec. 293.

[11] *Laws*, 1897, ch. 355; *Laws*, 1907, st. 170 (10).

[12] *Revised Statutes*, 1898, sec. 288.

[13] *Laws*, 1899, ch. 290; *Laws*, 1901, ch. 419. In 1874 the superintendent attempted to remove the janitor of the supreme court (the court sits in the capitol), theretofore appointed by the court without any express provision of law, and to appoint another in his place. The court held that the superintendent has no such power, but that every court of record has the inherent power of appointing such a necessary assistant, which power cannot be taken from the court. *In re Janitor* 35 *Wis.* 410 (1874). At that time the janitor of the supreme court acted also as janitor of the adjoining state library. Later the governor or the trustees of the library were authorized to appoint additional janitors for the library and supreme court rooms. *Laws*, 1885, ch. 132; *Revised Statutes*, 1898, sec. 2400. The custodian of memorial hall (in the capitol) is appointed by the governor. *Laws*, 1901, ch. 125, sec. 5; *Laws*, 1903, ch. 200.

II. The Functions of the Superintendent

In the performance of most of his duties the superintendent has always been subject to the direction of the governor and the legislature or the governor alone.

He has charge of the capitol and the capitol grounds[14] and of all movable property of the state not in charge of other officers, and makes such improvements as are from time to time authorized by law.[15]

In 1859 the superintendent became general purchasing agent, under the direction of the governor, for supplies, etc., needed about the capitol,[16] and three years later agent for the purchase of stationery for the use of the state.[17] Previously there had been little uniformity of system in such purchases, which led to great extravagance.[18] Since 1866 all claims for such purchases have been subject to the governor's approval before payment.[19] The same year a board was established, consisting of the governor, secretary of state, and state treasurer, whose duty it is, at the request of the superintendent, or on order of the governor, to examine any chattel property of the state in his hands not in use and to direct the disposal of the same.[20]

The superintendent has had a varying authority in assigning the rooms in the capitol to the various officers. There was no general provision for such assignments until 1897, but the assignments had been made by the legislature, the secretary of state, the governor, or the superintendent of public property.

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[14] The care of the executive residence was expressly included among his duties by the *Revised Statutes* of 1898, sec. 287. From 1872 to 1879 there was a board of park commissioners, consisting of three members appointed by the governor for the term of six years. The purpose of the commission was to lay out the capitol grounds and make regulations for the general management of the same, under the direction of the governor. Labor was furnished by the superintendent. *Laws*, 1872, ch. 93; *Laws*, 1879, ch. 139.

[15] *Statutes*, 1839, p. 82, sec. 2; *Laws*, 1849, ch. 2, secs. 1, 5; *Revised Statutes*, 1898, sec. 287. When improvements are very extensive it is customary to put them in charge of a temporary commission appointed for the purpose.

[16] *Laws*, 1859, ch. 89, secs. 1, 5; *Revised Statutes*, 1898, sec. 288.

[17] *Laws*, 1862, ch. 390; *Revised Statutes*, 1898, secs. 289–92.

[18] *E. g.*, *Senate Journal*, 1857, pp. 296–7, 326–8.

[19] *Laws*, 1866, ch. 48, sec. 4; *Revised Statutes*, 1898, sec. 293.

[20] *Laws*, 1866, ch. 48, secs. 1–3, 7; *Revised Statutes*, 1898, sec. 294.

Although a joint resolution passed by the legislature in 1897 gives the governor full control of all office rooms in the capitol and complete discretion in assigning them,[21] acts of the legislature creating new offices as often provide for assignment by the superintendent as by the governor.

The superintendent's connection with the custody and distribution of public documents is noted elsewhere.[22] By a law of 1883 he is required to make an annual report to the governor of all the affairs pertaining to his office, including an inventory of all personal property belonging to the state, and a statement of all amounts received and disbursed.[23] There had previously existed no adequate check upon the superintendent in this direction.[24]

[21] *Joint Resolution*, No. 34 S., *Senate Journal*, 1897, p. 475.
[22] *Below*, p. 105.
[23] *Laws*, 1883, ch. 159; *Revised Statutes*, 1898, sec. 291.
[24] *House Journal*, 1841-2, pp. 584-604; *Assembly Journal*, 1882, p. 799.

CHAPTER VII

THE COMMISSIONERS OF THE PUBLIC LANDS [1]

I. The Organization of the State Land Office. II. The Functions of the Commissioners.—Management of the State Lands.—Management of the Public Trust Funds.

I. The Organization of the State Land Office

The constitution makes the secretary of state, state treasurer, and attorney general a "board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom."[2] The board was known as the commissioners of the school and university lands until 1878, when the present title of commissioners of the public lands was adopted,[3] in recognition of the extended authority of the board. In the constitutional convention it was asserted that the commission was thus constituted in order to prevent the frauds which had been perpetrated in other states where such commissions were appointed by the legislatures. The control of the lands was put in "high and respectable hands." The keeping of the funds properly belonged to the treasurer, and legal matters to the attorney general, and, moreover, the state would thus be saved additional expense.[4] But on account of the mismanagement and fraud which followed, attempts were made at times practically to put the funds in charge of the several counties.[5]

[1] *Cf.* Phelan, *Financial History of Wisconsin*, pp. 236–82.

[2] *Constitution*, Art. X, sec. 7.

[3] *Laws*, 1849, ch. 212, sec. 1; *Revised Statutes*, 1878, sec. 185; *Revised Statutes*, 1898, sec. 185.

[4] *Journal of Constitutional Convention*, 1847–8, pp. 323–4. The establishment of the commission had been anticipated in a house resolution of 1838. *House Journal*, 1838, p. 67.

[5] *Assembly Journal*, 1857, pp. 653–5; *Assembly Journal*, 1858, pp. 1549–55.

The manner of management which disgraced the administration of the public lands and the trust funds especially during the early history of the state was due in part to this policy of saving "additional expense."[6] There was no provision for an office of the commission, separate from the offices of the *ex officio* members, until 1856, when a separate department was established.[7] During recent years the business of the land office has very much decreased, and it was actually abolished as a separate department by a law of 1899, which was repealed, however, a short time after going into effect.[8] Until 1856 clerk hire, etc., were paid wholly from fees received, but from that time to 1897 the commissioners were entirely unrestricted in the appointment and compensation of clerks paid out of the state treasury.[9] The number of clerks and their compensation were fixed by statute in 1897,[10] but again since 1901 the commissioners have had some liberty in determining the compensation.[11] Besides the office clerks, there were, from 1860 to 1901, other subordinates, known as timber clerks or trespass agents, the number at times being wholly unlimited by law. For the twenty-five years following 1876 they were subordinates of the governor rather than of the commissioners.[12] In 1901 the duties of the agents devolved upon the chief clerk of the land office,[13] but in 1905 the state forester became *ex officio* state trespass agent, and the assistant state forester, assistant state trespass agent.

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[6] Phelan, *Financial History of Wisconsin*, pp. 236–82.

[7] *Laws*, 1856, ch. 93, sec. 1; *Laws*, 1861, ch. 267, sec. 1; *Revised Statutes*, 1878, sec. 186; *Laws*, 1903, ch. 354. See *Assembly Journal*, 1856, pp. 28–30; *Annotated Statutes*, sec. 186, note.

[8] *Laws*, 1899, ch. 258; *Laws*, 1901, ch. 432. See *Assembly Journal*, 1897, p. 60; *Senate Journal*, 1899, pp. 33–4; *Report of Commissioners of Public Lands*, 1900, pp. 38–9; *Senate Journal*, 1901, p. 50; *Madison Democrat*, Dec. 13, 1898.

[9] *Laws*, 1849, ch. 212, sec. 57; *Laws*, 1856, ch. 93, secs. 1–2.

[10] *Laws*, 1897, ch. 355; *Revised Statutes*, 1898, sec. 187.

[11] *Laws*, 1901, ch. 432, secs. 2, 4.

[12] *Laws*, 1860, ch. 277; *Laws*, 1871, ch. 21; *Laws*, 1876, ch. 314; *Laws*, 1891, ch. 320. The chief purpose of the act of 1876 giving the appointment and control of the trespass agents to the governor was perhaps to oust the then incumbents for the sake of spoils. Opponents of the bill maintained that it was unconstitutional, as taking from the commissioners power vested in them by the constitution. *Wisconsin State Journal*, Feb. 29, Mar. 1, 1876; *Assembly Journal*, 1876, pp. 596–9.

[13] *Laws*, 1901, ch. 432, sec. 7. The chief clerk is an *ex officio* member of the state board of immigration. *Laws*, 1907, st. 237h.

The former is authorized to appoint as his subordinates such trespass agents as he may deem expedient.[14]

II. The Functions of the Commissioners

Management of the State Lands. The commissioners have had the general care and supervision of all lands belonging to the state except in the few instances in which the supervision has been vested elsewhere.[15] Up to 1895 all state lands were selected by special commissioners appointed for the purpose,[16] but since that year the commissioners of public lands have been authorized to select the "indemnity swamp lands" to which the state may be entitled.[17] The commissioners have had very little to do with the appraisal of state lands, special commissions for the purpose attending to the matter in the earlier period,[18] and the legislature fixing the minimum price of sale in most cases during more recent years.[19] Although the commissioners are made by the constitution commissioners for the sale of the school and university lands, by statute the governor was, doubtless illegally, associated with them in conducting the sales of these as well as of other public lands until 1872.[20] Escheated lands (which go to the school fund) were sold by the state superintend-

[14] *Laws*, 1905, ch. 264, secs. 12–4. For the appointment of trespass agents for certain other lands see:—(1) St. Croix and Lake Superior R. R. Lands: *Laws*, 1864, ch. 277; *Laws*, 1869, ch. 46; *Laws*, 1876, ch. 335; *Assembly Journal*, 1869, pp. 49–55; *Wisconsin State Journal*, July 14, 1869; *Report of State Treasurer*, 1894, p. 51. (2) Sturgeon Bay and Lake Michigan Ship Canal and Harbor Co. Lands: *Laws*, 1870, ch. 92; *Laws*, 1871, ch. 165; *Private and Local Laws*, 1872, ch. 104; *Report of State Treasurer*, 1882, p. 33; *Laws*, 1893, ch. 11.

[15] *Laws*, 1849, ch. 212, sec. 54; *Revised Statutes*, 1898, sec. 185.

[16] *E. g., Statutes*, 1839, p. 158; *Laws*, June, 1848, p. 42; *Laws*, 1863, ch. 265.

[17] *Laws*, 1895, ch. 242, sec. 1; *Revised Statutes*, 1898, sec. 185.

[18] *E. g., Laws*, June, 1848, p. 123; *Laws*, 1850, ch. 236.

[19] *Laws*, 1856, ch. 125, sec. 6; *Laws*, 1864, ch. 455; *Laws*, 1866, ch. 121, sec. 2; *Revised Statutes*, 1898, sec. 202; *Laws*, 1907, st. 207.

[20] *Laws*, 1849, ch. 212, secs. 3, 29; *Laws*, 1856, ch. 125, sec. 1; *Laws*, 1859, ch. 187; *Laws*, 1872, ch. 55; *Revised Statutes*, 1898, secs. 207, 211.

ent until 1878, when the commissioners took charge of these also.[21]

In interpreting a clause of the constitution which empowers the commissioners "to withhold from sale any portion of such lands [school and university lands] when they shall deem it expedient,"[22] the supreme court in *State v. Cunningham*[23] held that this provision vests the power of withdrawing these lands from the market solely in the commissioners, and hence prevents any such action by the legislature. The recent legislation creating a state forest reserve, which includes school and university lands, and forbidding the sale of any lands therein except with the approval of the authorities of the reserve,[24] must therefore be regarded by the commissioners as merely advisory so far as the sale of school and university lands is concerned. Provisions in force until 1878 ,associating the governor with the commissioners in withholding these lands from sale, and authorizing the governor to suspend the sales under certain circumstances,[25] were doubtless likewise unconstitutional.

Before the commission was established the governor issued all patents for public lands.[26] The patents issued by the commissioners were signed by the governor and countersigned by the secretary of state until 1861, but since then have been signed by the commissioners alone.[27] Deeds to purchasers of escheated

[21] *Laws*, 1855, ch. 91; *Annotated Statutes*, secs. 283-4 and note; *Revised Statutes*, 1898, secs. 283-4. From 1883 to 1898 the governor and the commissioners were authorized to settle any differences between the state and railway companies in relation to lands claimed by the state as "swamp lands" within the limits of the railroad grants. *Laws*, 1883, ch. 215; *Revised Statutes*, 1898, sec. 4978.

[22] *Constitution*, Art. X, sec. 8.

[23] 88 *Wis.* 81 (1894). But see *Report of Attorney General*, 1906, pp. 86-7. In the constitutional convention Mr. Lovell declared this section of the constitution to be "inconsistent with itself." "It provided that the legislature might sell the lands, and then gave the commissioners the power to reserve them from sale. They might disagree and come in collision." *Journal of Constitutional Convention*, 1847-8, p. 322.

[24] *Laws*, 1903, ch. 450, secs. 6-7; *Laws*, 1905, ch. 264, sec. 3; *Laws*, 1907, ch. 143, sec. 2. See also *State v. Hunter*, 119 *Wis.* 450 (1903).

[25] *Laws*, 1849, ch. 212, secs. 2, 52; *Revised Statutes*, 1878, sec. 207; *Revised Statutes*, 1898, sec. 207 and note.

[26] *E. g., Local Acts*, 1838-9, No. 26, sec. 10; *Laws*, 1845, p. 24, sec. 10.

[27] *Laws*, 1849, ch. 112, sec. 25; *Laws*, 1861, ch. 281, sec. 1; *Revised Statutes*, 1898, sec. 221. Power to execute conveyances or patents may not be transferred from the commissioners to any other officer. *McCabe v. Mazzuchelli*; 13 *Wis.* 479 (1861). See also *State v. Harvey*, 11 *Wis.* 33 (1860). *Cf.* above, p. 35.

lands, formerly issued by the governor, have been issued by the commissioners since they took charge of the sales of these lands.[28]

The school lands were leased by the town commissioners of schools from 1842 to 1849,[29] but since 1849 the lease of all public lands has generally been in charge of the commissioners.[30] However, by a law of 1865 the town supervisors are authorized to lease for certain purposes the swamp lands within the town.[31]

There has been very much difficulty in dealing with trespasses on the public lands.[32] To prevent such trespasses or to bring the trespassers to punishment has been the purpose of the timber clerks or trespass agents, under the direction of the governor or the commissioners or, as at present, the state forest warden, who is now state trespass agent.[33]

In addition to this protection of the public lands, the state has recently undertaken their development to a certain extent by provisions for a state forest reserve. This is under the supervision of the state board of forestry, consisting of the president of the university, director of the state geological survey, dean of the college of agriculture, attorney general, and one other member appointed by the governor, and under the more direct management of the state forest warden, a technically trained forester appointed by the board. The state forest warden is also state fire warden, and it is his duty as such to safeguard not only the forests on the public lands but those throughout the state.[34]

It should be noted that the commissioners' discretion has

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[28] *Laws*, 1855, ch. 91, sec. 2; *Revised Statutes*, 1878, sec. 284; *Revised Statutes*, 1898, sec. 284.

[29] *Laws*, 1841-2, p. 45, sec. 2.

[30] *Laws*, 1849, ch. 212, sec. 53; *Revised Statutes*, 1898, sec. 194.

[31] *Laws*, 1865, ch. 537, sec. 20; *Laws*, 1907, st. 257.

[32] *E. g.*, *Report of Commissioners of School and University Lands*, 1855, pp. 26-7; *Governor's Message*, 1858, pp. 27-8.

[33] *E. g.*, *Laws*, 1857, ch. 54, sec. 4; *Revised Statutes*, 1898, sec. 240. See *above*, pp. 71-2.

[34] *Laws*, 1905, ch. 264. This supplants the very imperfect statute of 1903. *Laws*, 1903, ch. 450. *Report of Attorney General*, 1906, pp. 85-8 (1904). From 1895 to 1903 the chief clerk of the land office and one of his assistants acted as state forest warden and deputy, respectively. *Laws*, 1895, ch. 266, sec. 1. For recent provisions in reference to the establishment and control of the interstate park of the Dalles of the St. Croix and state parks, see *Laws*, 1895, ch. 315; *Laws*, 1899, ch. 102; *Laws*, 1901, ch. 305; *Laws*, 1905, ch. 395; *Laws*, 1907, ch. 109; —— *Laws*, 1907, st. 1494t.

always been limited by numerous detailed regulations of law in the management of the public lands, as well as in the management of the trust funds in their charge. Their duties with respect to the management of the state lands have become, with the sale of most of the lands, comparatively unimportant, and the land office is now of importance, chiefly in the management of the trust funds of the state.

Management of the Public Trust Funds. By a provision of the constitution the commissioners invest all funds arising from the sale of school and university lands and all other school and university funds, as the legislature may direct.[35] As other lands have come into the possession of the state, the funds from these also have been entrusted to the commissioners. In making investments in most cases the commissioners have acted alone, but in others the approval of the governor has been necessary.[36] In the placing of loans the commissioners have been subject to much special legislation.

The school fund is apportioned by the state superintendent,[37] and the income from the drainage fund by the commissioners.[38]

The commissioners keep all records relating to the public lands.[39] They have always been required to make detailed reports of the transactions of their office to the legislature or to the governor.[40]

[35] *Constitution,* Art. X, secs. 7–8.
[36] *Laws,* 1876, ch. 340, sec. 4; *Revised Statutes,* 1898, sec. 160.
[37] *Above,* p. 47, note 63.
[38] *Laws,* 1858, ch. 67, sec. 3; *Revised Statutes,* 1898, sec. 254.
[39] *Laws,* 1849, ch. 212, sec. 101; *Laws,* 1905, ch. 354.
[40] *Laws,* 1849, ch. 212, sec. 58; *Revised Statutes,* 1898, sec. 191.

CHAPTER VIII

THE ADMINISTRATION OF TAXATION[1]

I. The Preparation of the State Budget. II. The Various Systems of Taxation. 1. The General Property Tax: the State Tax Commission.—*The Increase and the Reduction of the State Levy.—The Assessment of Taxes.—The Apportionment of Taxes.—The Collection of Taxes.* 2. The Taxation of Corporations. *The License Tax.—The Taxation of Railroads and Certain Other Carriers.* 3. The Inheritance Tax. 4. The Suit Tax. 5. Miscellaneous License Taxes.

I. The Preparation of the State Budget

During the territorial period the appropriations by congress for the expenses of the legislative assembly, etc., were based upon estimates submitted by the secretary of the treasury of the United States.[2] In 1836 the president of the state senate and the speaker of the house were directed by the assembly to prepare estimates as the basis of the secretary's action,[3] but apparently during most of the period these preliminary estimates were made by the governor.[4] There was no officer charged with preparing estimates for expenses to be paid out of the territorial treasury. The secretary of state has always been required to make detailed estimates of the expenses to be defrayed from the state treasury, as a basis for action by the legislature.[5] The

[1] *Cf.* Phelan, *Financial History of Wisconsin*, pp. 291–454.

[2] *Organic Law*, sec. 11.

[3] *House Journal*, 1836, pp. 127, 141.

[4] *House Journal*, 1840-1, appendix, p. 85; *Council Journal*, 1842-3, appendix, pp. 49–53.

[5] *Laws*, June, 1848, p. 115, sec. 10 (2); *Revised Statutes*, 1898, sec. 144 (13); *Laws*, 1901, ch. 368.

secretary has made his estimates almost exclusively from the amounts received by the various departments during the preceding fiscal period, although the tax commission has recommended that all departments be required to file preliminary estimates with the secretary.[6]

II. The Various Systems of Taxation

Until recent years the general property tax has been the most important source of the state revenue, and legislation has been directed chiefly to this class of taxation. But with the development of the taxation of corporations the general property tax for state purposes has about disappeared, and henceforth the central authorities will be interested in the latter for the most part only in the control, which they have lately obtained, of the administration of taxation by the localities. The chief interest in the state administration of taxation is now divided between the problems of this central control and the problems incident to the taxation of corporations. The various minor classes of taxation have some interest on account of the peculiarities of their administration.

1. The General Property Tax: The State Tax Commission.

The Increase and the Reduction of the State Levy. The general property tax has of course been levied, in the usual sense of that word, only by the legislature.[7] But since 1869, whenever, before the apportionment of the state tax to the counties, it is evident that the appropriations exceed the amount of the state tax levied to meet the expenses of the year for which the tax was levied, the secretary of state is required to "levy" and apportion such additional amount as may be necessary to meet all authorized demands upon the state treasury up to the time when the next succeeding tax will be due.[8] For thirty years the validity of this measure seems to have remained unques-

[6] *Report of Tax Commission*, 1903, pp. 243–4.
[7] *Constitution*, Art. VIII, sec. 5.
[8] *Laws*, 1869, ch. 153, sec. 1; *Revised Statutes*, 1898, sec. 1071.

tioned, but in 1899 both the governor and the secretary were of the opinion that under the constitution the legislature itself is "the only tax-levying authority of the state" and that its power cannot be thus delegated; and the secretary therefore refused to make the additional levy called for by the statute under the circumstances.[9]

A similar principle is contained in the authority vested in a board consisting of the governor, secretary of state, and state treasurer, by a law of 1887, which directs that whenever in the opinion of the board the public interest requires it, they may apply the surplus in the treasury, or so much of it as they may deem proper, to reduce the state levy each year.[10]

The Assessment of Taxes. Up to 1852 the counties assessed the territorial or state taxes as they did their own, without any further control by the central administration than a requirement of the filing of a duplicate of the county tax[11] and, a little later, also local valuation statistics with the territorial or state treasurer.[12] The great inequality of the burden of taxation under this system had long been a subject of complaint[13] when the state assumed a greater control in 1852 by establishing a state board of equalization.

The Development of the State Tax Commission. The first board of equalization consisted of the governor, secretary of state, state treasurer, attorney general, and state superintendent,[14] the lieutenant governor and bank comptroller being added two years later.[15] Beginning with 1858, for the next fifteen years the board was composed of the state senate and the secretary of state.[16] This change was induced partly because of the dissatisfaction with the data available for the use of the board in the returns from the counties, and partly by the "anti-republican" nature of the old board. But the results of the

[9] *Wisconsin State Journal,* June 15, Sept. 28, Oct. 3, 12, 1899.
[10] *Laws,* 1887, ch. 397: *Revised Statutes,* 1898, sec. 1069a.
[11] *Laws,* 1837–8, No. 93, sec. 2.
[12] *Below,* p. 81.
[13] Especially, *Assembly Journal,* 1852, appendix, pp. 4–5.
[14] *Laws,* 1852, ch. 498, sec. 1.
[15] *Laws,* 1854, ch. 73, sec. 1.
[16] *Laws,* 1858, ch. 115, sec. 26.

change seem generally to have been bad. Rings were formed in the senate and much log-rolling took place, to the great detriment of some sections.[17] For this reason in 1873 a board composed of state officers was again established, the state board of assessment,[18] consisting of the secretary of state, state treasurer, and attorney general.[19] This board was replaced by the tax commission in 1901.

This commission, the direct outgrowth from the tax commission of 1897–8 (an investigating body)[20] was established in 1899 for ten years, "in order to secure improvement in the system and an equalization of taxation in this state,"[21] and was made a permanent institution in 1905.[22] It consists of three commissioners, appointed by the governor and senate for terms of eight years, only one member retiring at a time. "The persons to be appointed . . . shall be such as are known to possess knowledge of the subject of taxation and skill in matters pertaining thereto. So far as practicable they shall be so selected that the board will not be composed wholly of persons who are members of or affiliated with the same political party or organization. No person appointed . . . shall hold any other office under the laws of this state nor any office under the government of the United States or of any other state. Each such commissioner shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, engage in any occupation or business interfering with or inconsistent with his duties, or serve on or under any committee of any political party."[23]

In 1899 the commissioner (the former distinctions of commissioner, first assistant commissioner, and second assistant commis-

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[17] *Senate Journal*, 1860, pp. 816–8; *Wisconsin State Journal*, Mar. 12, 1860, Mar. 23, Apr. 1, 22, 28, 1868; *Report of Secretary of State*, 1868, pp. 38–9; *Wisconsin State Journal*, Feb. 4, 1874, Dec. 7, 9, 1878.

[18] The preceding board had been known as the board of assessors since 1870. *Laws*, 1870, ch. 144, sec. 1.

[19] *Laws*, 1873, ch. 235.

[20] *Laws*, 1897, ch. 340.

[21] *Laws*, 1899, ch. 206. See *Report of Tax Commission*, 1898, p. 182; *Wisconsin State Journal*, Apr. 18, 1899.

[22] *Laws*, 1905, ch. 380. See *Governor's Message*, 1905, p. 11.

[23] *Laws*, 1905, ch. 380, secs. 2–4. *Cf. Laws*, 1899, ch. 206, secs. 1, 7. The commissioners of 1899 were to serve ten years from 1899.

sioner do not now exist) became a member of the state board of assessment, presided at its meetings, and assisted the board with his information.[24] Finally in 1901 the old board was abolished, and the tax commission became the state board of assessment.[25]

While the board consisted of the senate and secretary of state and met during the recess of the legislature, members received a *per diem* and mileage the same as that of the members of the legislature.[26] but the members of the other boards (all *ex officio*) were paid no additional compensation for their services. The salaries of the commissioners, formerly from four to five thousand dollars,[27] are now five thousand dollars each.[28] Under the law of 1899 the commissioner was allowed to determine the number and the compensation of the clerks in the office,[29] but upon the governor's protest against vesting so much discretion in the commissioner,[30] the maximum amount of all disbursements of the office was later prescribed by law.[31] However, when the commissioners took over the administration of taxation of railroads, their discretion in appointing the "necessary" assistants for the purpose was not limited,[32] and although at present a few of the positions under the commission, with their salaries, are provided for by statute, the commissioners have full discretion in the employment of other subordinates and in determining their compensation.[33]

The Assessment of Taxes. By the law of 1852 the board was to meet annually to equalize the valuations made by the counties, "to produce a just relation between the valuations of the taxable property in the state."[34] The action of the various boards has always been annual with the exception of the years between 1859 and 1879, when it was biennial.[35]

[24] *Laws*, 1899, ch. 206, sec. 6.

[25] *Laws*, 1901, ch. 237, secs. 1, 6. See *Report of Tax Commission*, 1900, pp. 166–7.

[26] *Laws*, 1859, ch. 167, sec. 28.

[27] *Laws*, 1899, ch. 206, sec. 7; ch. 322.

[28] *Laws*, 1905, ch. 380, sec. 5.

[29] *Laws*, 1899, ch. 206, sec. 9.

[30] *Senate Journal*, 1901, p. 21.

[31] *Laws*, 1901, ch. 220, sec. 2.

[32] *Laws*, 1903, ch. 315, sec. 27.

[33] *Laws*, 1905, ch. 380, sec. 7.

[34] *Laws*, 1852, ch. 498, sec. 2.

[35] *Laws*, 1859, ch. 167, sec. 29; *Laws*, 1879, ch. 124.

The matter of getting correct returns from the localities has been the subject of much legislation. Before any central equalization was attempted, beginning with 1841 reports from the counties to the treasurer, auditor, or secretary were required, showing the local valuation of property.[36] After the creation of the first board, began a further series of laws to secure proper returns as a basis of action by the board,[37] one of them authorizing the secretary to send a special messenger for the required statistics in case of the neglect of the county authorities.[38] But the returns have never been satisfactory. In 1853 the secretary of state declared that the false valuations secured made any action on their basis "mere guess work," and the board did not even attempt to make an equalization until 1854.[39] It was claimed that the board of 1878 was the first body which had before it a complete set of returns from every county, and was "the first to endeavor honestly to live up to the law and equalize in fact as well as in name."[40] But persistent endeavor has been without satisfactory results.

As early as 1861, in a complaint of the inequality of taxation on account of the false returns of property, the secretary of state declared it to be doubtful if a return of all property could be secured unless through the appointment of assessors by the governor or the legislature, who by residence and tenure of office would be removed from local influence.[41] The state has not yet gone to this extremity, but the powers vested in the present tax commission would seem to have exhausted all remedies up to this point, and indeed as will appear, under certain circumstances the commissioners are practically substituted for the local assessors.

In 1899 the commission was given "general supervision of the

[36] *Laws*, 1840–1, No. 8, sec. 6; *Laws*, 1843–4, p. 6, sec. 6; *Revised Statutes*, 1849, ch. 15, sec. 41.

[37] *E. g., Laws*, 1854, ch. 73, secs. 4, 6; *Laws*, 1881, ch. 236, sec. 4; *Laws*, 1901, ch. 445, sec. 8; *Laws*, 1903, ch. 315, sec. 12; *Laws*, 1905, ch. 523, sec. 4; *Laws*, 1907, sts. 1007–9.

[38] *Laws*, 1874, ch. 43, sec. 2; *Revised Statutes*, 1898, sec. 1016.

[39] *Report of Secretary of State*, 1853, pp. 12–7; *Senate Journal*, 1854, pp. 508–10; *Report of Secretary of State*, Jan. 1854, pp. 11–3; Dec. 1854, pp. 43–4.

[40] *Wisconsin State Journal*, Dec. 7, 9, 1878.

[41] *Report of Secretary of State*, 1861, p. 222.

system of taxation throughout this state," but was really limited to making investigations and reporting the results to the legislature with recommendations. In making such investigations the commission was empowered to require individuals and corporations to give information, to examine their records, to summon witnesses, etc., and to direct the attorney general to proceed against persons refusing their demands.[42]

By legislation of 1901 and 1905 the powers of the tax commission have been very greatly increased.

The commissioners now exercise a general supervision and control over the administration of the laws of assessment and taxation by the local assessors, boards of review, supervisors of assessment, and county boards of assessment, "to the end that all assessments of property be made relatively just and equal at true value in substantial compliance with law." With the assistance of the district attorneys they direct proceedings to be instituted for the enforcement of penalties against local officers and other persons for failure to comply with the laws governing the return, assessment, and taxation of property, and cause complaints to be made against such officers to the proper court for their removal from office for misconduct or neglect of duty in this connection.[43] Over the supervisor of assessments the commissioners have additional authority. Should the county board fail to elect such supervisor as required by law, the appointment is made by the tax commissioners, and the compensation, within certain limits, is also prescribed by them. Further, the commissioners may even, upon charges preferred, remove any supervisor for incompetency, fraud, or wilful neglect of duty.[44]

Upon complaint made, the commissioners may in their discretion, either before or after an assessment has been completed, order a re-assessment of all taxable property in any assessment district by persons appointed by them for that purpose. When any local officer is unable to perform any of his duties in con-

[42] *Laws*, 1899, ch. 206, secs. 3–4.

[43] *Laws*, 1905, ch. 380, sec. 9 (1–4); *Laws*, 1901, ch. 445, sec. 10. *Cf. Laws*, 1901, ch. 220, sec. 1.

[44] *Laws*, 1905, ch. 523, sec. 1.

nection with this re-assessment, a special deputy for the purpose may be appointed by the commissioners. In making any of these appointments the commissioners are not confined to residents of the district where the re-assessment is ordered. Compensation for such service is, within certain limits, determined by the commissioners and, with the other expenses, is paid by the state and charged against the district.[45]

Until 1905 the assessment determined by the county board of equalization might be carried on appeal to the circuit court, which appointed a commissioner to pass upon the assessment;[46] but that year the tax commission, better suited for such a function on account of the data possessed by the commissioners as to the valuation of the property in the counties,[47] was substituted for the court. The commissioners are authorized in their discretion "to include in such review and redetermination all of the taxable property in said county and extend the same beyond the issues as made up on the preliminary hearing, if at any time during the progress of their investigations they shall be satisfied that such course is necessary in order to accomplish substantial justice and to secure relative equality as between all the assessment districts in such county." In making such investigations the commissioners have very extensive authority, including the powers of local assessors. The expenses of the review are paid in the same manner as the expenses in case of re-assessment.[48]

In securing information relative to taxation the commissioners have large powers over local officers, associations, and individuals, summoning witnesses and compelling their attendance with the assistance of the attorney general. They investigate not only the methods practiced in the localities but also the systems of other states and countries, and advise the governor and the legislature in reference to needed legislation.[49]

But after all the legislation which has been described above,

[45] *Laws*, 1905, ch. 259.

[46] *Laws*, 1880, ch. 291.

[47] *Report of Tax Commission*, 1907, pp. 10–11: *Wisconsin State Journal*, Aug. 22, 1906.

[48] *Laws*, 1905, ch. 474.

[49] *Laws*, 1905, ch. 380, secs. 9 (5–11, 13–14), 10. *Cf. Laws*, 1901, ch. 220, sec. 1.

conditions are far from satisfactory, especially in the assessment of personal property. "The efforts of the commission to secure compliance with the law have had no effect, and the state and local assessments of personal property are further apart in 1906 than at any former time."[50] Both the governor and the tax commissioners are convinced that the evil is inherent in the general property tax.[51]

The recently acquired authority of the commissioners to "inquire into the system of accounting of public funds in use in towns, cities, villages and counties, and to devise and prescribe a uniform system of accounting of the receipts and disbursements of public funds in the municipalities of the state,"[52] is an important extension of central administrative control over the localities, but it is only indirectly connected with taxation. The powers of the commissioners in the taxation of corporations are described below.[53]

The Apportionment of Taxes. Under the system which prevailed until 1845, the treasurer of the territory simply demanded the amount of taxes due the territory as shown in the reports made by the counties.[54] Under the present system the auditor or the secretary of state has apportioned and certified the state tax to the counties.[55]

The Collection of Taxes. The secretary of state superintends the collection of all taxes as of all other moneys due the state.[56] The taxes have always been payable to the territorial or state treasurer by the county treasurer.[57] Since 1858, when the county

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[50] *Governor's Message*, 1907, p. 7. See also *Report of Tax Commission*, 1907, pp. 19–26.

[51] *Governor's Message*, 1907, p. 6; *Report of Tax Commission*, 1907, pp. 20–4.

[52] *Laws*, 1905, ch. 380, sec. 9 (12).

[53] Pp. 87–9.

[54] *Laws*, 1837–8, No. 93, sec. 3.

[55] *Laws*, 1845, p. 1, sec. 6; *Revised Statutes*, 1849, ch. 15, sec. 42; *Revised Statutes*, 1898, sec. 1070.

[56] *Laws*, June, 1848, p. 115, sec. 10 (6); *Revised Statutes*, 1898, sec. 144 (9). See also *above*, p. 42. From 1859 to 1878 the secretary was authorized to decide, with the advice of the attorney general, all questions as to the construction of the tax laws, subject to an appeal to the supreme court. *Laws*, 1859, ch. 167, sec. 50; *Revised Statutes*, 1878, sec. 4978.

[57] *Laws*, 1837–8, No. 93, sec. 3; *Laws*, 1845, p. 1, sec. 4; *Revised Statutes*, 1849, ch. 15, sec. 84; *Revised Statutes*, 1858, ch. 18; *Laws*, 1859, ch. 14; *Laws*, 1899, ch. 335, sec. 8. See *Governor's Message*, 1859, p. 15.

treasurer does not pay over the full tax, he has been required to file with the state treasurer an affidavit to the effect that he has paid the whole amount received by him.[58]

Until 1858 the counties were very delinquent in paying their quotas of the state tax.[59] From the beginning penalties were enacted against the county treasurers for any neglect to turn over the state taxes,[60] but the delinquency of the smaller localities in their payments to the county treasurer made these penalties of no avail.[61] For some years previous to 1858 it had been the practice of the state treasurer to retain the school moneys apportioned to the delinquent counties in order to balance their indebtedness to the state, but that year the treasurer concluded that such a procedure was not authorized by law,[62] as was later decided by the supreme court in the case of swamp land funds retained for the same purpose.[63] In 1858 a penalty was enacted against delinquent counties, and the practice of retaining school moneys legalized, no county being permitted to draw any money from the state treasury as long as it should be indebted to the state for taxes.[64] The operation of this law was later declared to have been "most happy",[65] but it was repealed the next year after its enactment, and even the penalties collected were returned,[66] on the ground that by reason of the delinquency of some of the towns of a county the burden was thrown upon those which had already paid.[67] But the "old difficulty" returned,[68] and again in 1872 a penalty was provided against delinquent counties, with the retention of all moneys due the

[58] *Laws*, 1858, ch. 152, sec. 3; *Revised Statutes*, 1898, sec. 1122.

[59] *E. g., House Journal*, 1839–40, pp. 317–8; *Senate Journal*, June, 1848, appendix, pp. 22–4; *Wisconsin Weekly Patriot*, Nov. 27, 1858.

[60] *Laws*, 1837–8, No. 93, sec. 4; *Revised Statutes*, 1898, sec. 1123.

[61] *Assembly Journal*, 1858, pp. 1300–1; *Weekly Wisconsin Patriot*, Feb. 26, 1859.

[62] *Assembly Journal*, 1858, p. 1300.

[63] *State v. Hastings*, 11 *Wis.* 448 (1860).

[64] *Laws*, 1858, ch. 152, secs. 1–2.

[65] *Assembly Journal*, 1862, p. 641.

[66] *Laws*, 1859, ch. 29, sec. 1; ch. 67.

[67] *Weekly Wisconsin Patriot*, Feb. 26, 1859.

[68] *E. g., Assembly Journal*, 1862, p. 641; *Report of Secretary of State*, 1866, p. 37.

county from the state except school moneys.[69] The "old difficulty" disappeared.[70]

2. The Taxation of Corporations

The state taxation of corporations began in 1848 with telegraph companies,[71] and has been extended to many classes of corporations, with the result that most of the state revenues are now derived from this source. The methods of taxation applied to corporations are the "license system" and the system governing the taxation of railroads and certain other carriers.

The License Tax.[72] This was the method first employed[73] in the state taxation of corporations, and it is still employed in the case of many classes of corporations. The method is practically that of self-assessment. The tax is usually estimated by the state treasurer upon the basis of reports of the required data made by the corporations to him, and is paid directly to him. At present all insurance companies are licensed by the commissioner of insurance, the companies making their reports to him, and in some cases also paying the tax through the commissioner. The license taxes are enforced by money forfeitures, forfeiture of license, or sale of the corporate property.[74]

The Taxation of Railroads and Certain Other Carriers.[75] The license system of taxing railroads was established in 1854 and continued to 1903, when the present *ad valorem* system was

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[69] *Laws*, 1872, ch. 158; *Revised Statutes*, 1898, sec. 1124.

[70] *Assembly Journal*, 1873, appendix, p. 7.

[71] *Laws*, Feb., 1848, p. 257, sec. 3.

[72] The validity of the "license" system was upheld in *M. & M. R. R. Co. v. Board of Supervisors*, 9 *Wis.* 431 (1855), but the opposite conclusion was reached in *State v. W. L. & F. R. P. R. Co.*, 11 *Wis.* 35 (1860). However a return was made to the precedent of the former decision in *Kneeland v. Waukesha*, 15 *Wis.* 454 (1862). See also *State v. Railway Cos.*, 128 *Wis.* 449, (1906); *Nunnemacher v. State*, 129 *Wis.* 190 (1906); *State v. C. & N. W. Ry. Co.* 112 *N. W.* (Wis.) 515 (1907); *State v. C. M. & St. P. Ry. C.*, 112 *N. W.* (Wis.) 522 (1907).

[73] *Laws*, Feb., 1848, p. 257, sec. 3.

[74] *E. g., Laws*, 1891, ch. 422; *Revised Statutes*, secs. 1222 g-j.

[75] *Cf. State v. Railway Cos.*, 188 *Wis.* 449, 485-98 (1906); Snider, *Taxation of Gross Receipts of Railways in Wisconsin.*

substituted.[76] At first the companies simply paid to the state treasurer a tax on their gross earnings, estimated upon the basis of reports which he received from the companies.[77] Although by the provision of a statute of 1874 the railroad commissioner was required to ascertain and report to the state treasurer certain data,[78] which might have been used as a check upon the report made by the railroads, the treasurer was not required to consider this information before issuing the license, the companies continuing to be "their own assessors and their own collectors"[79] until 1899, when the approval of the reports by the commissioner was required before the license could be issued.[80] In case of failure to report as required, the treasurer was authorized to make the assessment without the report.[81]

In 1903 the taxation of railroads was assimilated to the taxation of general property and the assessment of the tax turned over to the tax commission.[82] Thirty years before the secretary of state had urged that the railroads should be taxed by the state board of assessment.[83] In making the assessments the commissioners are given access to all records in the various departments of the state and local governments and are authorized to require local officers to report for their information. All records of the railroads are subject to examination by the commissioners, and the commissioners may compel the attendance of witnesses. Annual reports to the commission are required of all railroads,

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[76] By *Laws*, 1903, ch. 315, sec. 23 and *Laws*, 1905, ch. 216, sec. 9, the payment of license fees as part of the tax was retained until 1909, "so that in case the *ad valorem* provisions were assailed in the courts, sufficient time would elapse for a judicial determination of the validity of these provisions and in the meantime the license fees on gross earnings would be paid into the state treasury." *Report of Tax Commission*, 1907, p. 84.

[77] *Laws*, 1854, ch. 74; *Laws*, 1860, ch. 174.

[78] *Laws*, 1874, ch. 273, sec. 12; *Revised Statutes*, 1898, sec. 1795; *Laws*, 1899, ch. 308, sec. 3.

[79] *Report of Railroad Commissioner*, 1884, p. 13.

[80] *Laws*, 1899, ch. 308, sec. 4. See *State v. Railway Cos.*, **128 Wis. 449,** 477 (1906). In 1856, in case of the Wisconsin & Superior R. R. Co., the governor was authorized, in order to ascertain the truth of the statements made in the company's report, to examine the books and papers of the company, and to examine under oath the officers, etc. *Laws*, 1856, ch. 137, sec. 23.

[81] *Laws*, 1854, ch. 74, sec. 5.

[82] *Laws*, 1903, ch. 315.

[83] *Report of Secretary of State*, 1873, pp. 28–30. *Cf. Report of Tax Commission*, 1903, pp. 182–4, 259.

but if the report is not made as required, the commission is directed to "inform itself the best way it may" on the matters necessary for valuation. The commission determines the average rate of taxation on all the property in the state, and applies this rate to the railroads.[84]

The enforcement of the payment of railway taxes to the state treasurer has been secured by provisions for pecuniary forfeit, sale of the road, forfeiture of franchise, and revocation of license.[85]

This method of taxation had already been applied in 1899 to express companies, sleeping-car companies, freight-line companies, and equipment companies, formerly paying a license tax. When the system was changed in 1899, the assessment was put into the hands of the old state board of assessment instead of the tax commission which finally took charge in 1903. Under the statutes of 1899 and subsequent legislation the procedure is very similar to that in the taxation of railroads.[86] Likewise telegraph companies came under the authority of the commission in 1905.[87]

According to the provisions of statutes of 1895 and 1897 certain classes of street railways, and electric light and power companies were required to pay a license tax to the municipality, of which a certain proportion was turned over as a state and county tax to the county treasurer. The county treasurer then remitted the state's share to the state treasurer.[88] Previous to 1899 the state administration had no check whatever upon the localities in respect to this tax, and the reports from the local assessors and the companies required by statutes of that year were made only to the railroad commissioner.[89] In 1905 the

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[84] *Laws*, 1903, ch. 315; *Laws*, 1905, ch. 216. *Cf. Report of Tax Commission*, 1907, pp. 84–108. The validity of this railroad taxation was determined in *C. & N. W. Ry. Co. v. State*, 128 *Wis.* 553 (1906). See also *Report of Tax Commission*, 1907, pp. 108–21.

[85] *Laws*, 1854, ch. 74; *Laws*, 1860, ch. 174, sec. 3; *Laws*, 1862, ch. 22, secs. 4–5; *Revised Statutes*, 1898, secs. 1212, 1214; *State v. Railway Cos.*, 128 *Wis.* 449 (1906).

[86] *Laws*, 1899, chs. 111–4; *Laws*, 1905, ch. 477. See *Report of Tax Commission*, 1903, p. 9.

[87] *Laws*, 1905, ch. 494.

[88] *Laws*, 1895, ch. 363; *Laws*, 1897, ch. 223.

[89] *Laws*, 1899, chs. 308, 329.

authority of the tax commission was extended to such corporations, now including street railway companies and electric light and power companies operated in connection with street railways, under provisions similar to those governing the taxation of railroads. But a proportion of the tax is divided by the commissioners among the towns, cities, and villages in which the companies operate, upon the basis of gross receipts in the various localities.[90]

This method of apportionment is similar to that employed in the taxation of a certain class of water craft while such were subject—from 1901 to 1905—to special state taxation. The tax was paid to the state treasurer upon the basis of statements made by the companies to the secretary of state, and the state treasurer paid to the county treasurer the county's share of the tax.[91]

3. The Inheritance Tax[92]

The central authorities have considerable control over the counties in securing the state's share of the inheritance tax established in 1903. The tax is paid to the county treasurer,[93] who reports to the secretary of state the amount received, and pays over the state's share to the state treasurer. The receipt given by the county treasurer upon the payment of the tax must be countersigned by the secretary of state in order to be valid in the final accounting of the estate, and holders of securities belonging to the decedents are prohibited from delivering them to the executors, etc., without prior notice to the secretary. The county judge reports to the secretary the name of every decedent whose estate is liable for such tax and upon whose estate an application has been made for letters of administration, and also states the valuation of the legacies, etc.

[90] *Laws*, 1905, ch. 493.

[91] *Laws*, 1901, ch. 192; *Laws*, 1905, ch. 487.

[92] The inheritance tax law of 1899 was declared to be unconstitutional in *Black v. State*, 113 *Wis.* 205 (1902), but the constitutionality of the present act was upheld in *Nunnemacher v. State*, 129 *Wis.* 190 (1906).

[93] In certain cases the tax may be paid either to the county treasurer or to the secretary of state.

The secretary may apply to the county court for a reappraisal of the estate. Composition of expectant estates may be effected, under certain circumstances, by the county treasurer, but only with the consent of the secretary of state and attorney general. As the last instance of control by the central administration, the commissioner of insurance, upon application from the county court, determines the value of future and contingent estates.[94] But much difficulty has been experienced in enforcing the law, and large sums are believed to have been lost to the state on account of undervaluation by the local authorities and the concealment of property. Since the tax commission is much better equipped to enforce the law, both the governor and the secretary of state have urged that the administration of the tax should be transferred to the commission.[95]

4. The Suit Tax

The dollar tax on suits in the circuit court was created by the constitution in 1848.[96] Its only noteworthy feature is the difficulty with which it has been collected. At first it was required that the tax should be paid directly by the clerk of the court to the state treasurer,[97] but a law of the next year directed the clerk to report to the secretary of state the amount of the tax received by him, and to pay the tax to the circuit judge, filing the latter's receipt with the secretary, who deducted the amount from the judge's next quarter's salary.[98] A change again was made by the law of 1855, which directs the clerk to make quarterly payments of the tax to the county treasurer for the use of the state, and at the same time to file the latter's receipt with the secretary of state and send him a statement of the number of suits during the quarter. The secretary is to notify the circuit judge of any failure of the clerk to report, and the

[94] *Laws*, 1903, ch. 44: *Cf. Report of Tax Commission*, 1907, pp. 126–40.

[95] *Governor's Message*, 1905, p. 12; *Governor's Message*, 1907, p. 13; *Report of Secretary of State*, 1906, p. 4. See also *Wisconsin State Journal*, June 26, 1907.

[96] *Constitution*, Art. VII, sec. 18.

[97] *Laws*, June, 1848, p. 19, sec. 17.

[98] *Revised Statutes*, 1849, ch. 10, sec. 61.

latter is liable to removal by the judge for such neglect.[99] The law has never been well obeyed, and large amounts have been lost to the state,[100] but for many years the state authorities have seemed to take no interest in securing a better compliance with the provisions of the law.[101]

5. Miscellaneous License Taxes

Beginning with 1852 "hawkers and peddlers"—later legislation has added other such transients—have been required to pay license fees to the state treasurer, either directly or through the treasury agent. The license is issued by the secretary of state.[102]

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[99] *Laws*, 1855, ch. 56: *Revised Statutes*, 1898, secs. 743–4.

[100] *E. g.*, *Report of Secretary of State*, 1851, pp. 4–5; *Assembly Journal*, 1851, p. 826; *Senate Journal*, 1861, pp. 362–3; *Report of State Treasurer*, 1868, p. 11.

[101] In this connection may be mentioned another kind of state revenue collected with great difficulty. The constitution of 1848 directs that the clear proceeds of all fines collected in the several counties for any breach of the penal laws shall be paid into the state treasury (*Constitution*, Art. X, sec. 2), and the *Revised Statutes* of 1849 require such payments to be made by the county treasurers with the payments of the county's quota of the state taxes. *Revised Statutes*, 1849, ch. 10, sec. 111; *Revised Statutes*, 1898, sec. 715 (5). As early as 1854 it was believed that many thousands of dollars of such fines were illegally kept from the state treasury (*Assembly Journal*, 1854, p. 15), and hence a statute of that year authorized the governor to appoint as many state agents as he deemed necessary to collect any money due the state from fines not remitted as prescribed by law. The agents received thirty per cent. of their collections as compensation. They had authority to examine all records of any court or officer concerning the proceedings in any suit instituted for the recovery of any fines or showing the disposition of the moneys received therefor, and to collect such moneys not paid within the time required by law. *Laws*, 1854, ch. 87. The governor considered the operation of this measure to have been successful the first year (*Governor's Message*, 1855, p. 8), but for some reason it was repealed in 1859. *Laws*, 1859, ch. 121, sec. 9. Apparently the law has not been well obeyed any of the time since, the larger and more prosperous counties being the worst offenders. *Report of State Superintendent*, 1880, pp. XL–XLI; *Assembly Journal*, 1882, p. 21. After the supreme court's decision of 1881 to the effect that the "clear proceeds" are to be found by subtracting only the county treasurer's two per cent. fees, and not, as was contended, also the costs of prosecution [*State v. Miles*, 52 *Wis.* 488 (1881). See also *State v. Casey*, 5 *Wis.* 318 (1856); *Patterville v. Bell*, 43 *Wis.* 488 (1878); *State v. Delano*, 80 *Wis.* 259 (1891)] the law was better obeyed (*Assembly Journal*, 1882, p. 21), but it is believed that very large sums are still illegally withheld. See *Bills*, 1905, No. 405 S., sec. 3; Sub. No. 656 A., sec. 3; *Wisconsin State Journal*, Apr. 26, 1905.

[102] *Laws*, 1852, ch. 386, and many amendments; *Laws*, 1905, ch. 490; *Laws*, 1907, sts. 1573, 1584. This tax was declared unconstitutional in 1904 on ac-

In 1866 the secretary of state reported that the law requiring the payment of these fees was not generally obeyed and that the state was overrun by non-resident dealers.[103] Accordingly the office of treasury agent was established in 1867 in order to secure the enforcement of the law. The agent is appointed by the governor, holding office, formerly during the governor's pleasure,[104] but since 1905 for the term of two years.[105] His compensation formerly depended upon the amount of penalties collected for breach of the law and the amount of his collections,[106] or upon the latter alone.[107] Recently the fixed sum of two thousand dollars has been allowed for the salaries of both the agent and his assistant.[108] The agent may appoint an assistant treasury agent, and, for some purposes, special treasury agents. The agent is directed to enforce the provisions of the law in regard to hawkers, peddlers, etc., and to perform such other duties as the secretary of state may prescribe under any other license law. All of these officers have large powers in securing compliance with the law.[109] Whenever the agent deems it necessary the attorney general is required to assist in actions brought for the collection of forfeitures.[110] The report of the treasury agent is made to the governor.[111]

Licenses to private employment agencies are issued by the secretary of state upon payment of the requisite fees to him.[112]

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count of certain class legislation embodied in the law. *State v. Whitcom*, 122 *Wis.* 110. It had been previously upheld but this objection was not then considered. *Merrill v. State*, 38 *Wis.* 428 (1875). See also *Van Buren v. Downing*, 41 *Wis.* 122 (1876). The constitutional objections were removed by the law of 1905. Licenses to sellers of bankrupt stocks, etc., were formerly issued by the state treasurer instead of the secretary of state. *Laws*, 1891, ch. 443, sec. 4; *Laws*, 1905, ch. 490, sec. 16.

[103] *Report of Secretary of State*, 1866, pp. 38-9.

[104] *Laws*, 1867, ch. 176, sec. 1; *Laws*, 1872, ch. 177, sec. 1.

[105] *Laws*, 1905, ch. 490, sec. 10.

[106] *Laws*, 1867, ch. 176, sec. 3.

[107] *Laws*, 1905, ch. 490, sec. 14.

[108] *Laws*, 1907, st. 1583. The deputies receive a percentage of their collections. *Ibid.*

[109] *Laws*, 1867, ch. 176; *Laws*, 1868, ch. 177, sec. 13; *Laws*, 1870, ch. 72, sec. 15; *Revised Statutes*, 1878, sec. 1579; *Laws*, 1905, ch. 490, secs. 11-12.

[110] *Revised Statutes*, 1898, sec. 161 (5).

[111] *Laws*, 1889, ch. 172; *Laws*, 1905, ch. 490, sec. 11.

[112] *Laws*, 1901, ch. 420, sec. 10; *Laws*, 1903, ch. 434, sec. 9.

For a few years, upon payment of the required fees to the secretary of state, he issued to non-residents hunting licenses, countersigned by the state fish and game warden,[113] but since 1901 the licenses have been issued by the warden and countersigned by the secretary.[114]

[113] *Laws*, 1897, ch. 221, sec. 2.
[114] *Laws*, 1901, ch. 358, sec. 3.

CHAPTER IX

THE ADMINISTRATION OF ELECTIONS

I. General Elections. *Nominations.—Notice of Elections.—Election Returns.—The State Canvass: The Board of State Canvassers.* II. Special Elections. III. Contested Elections. IV. Voting Machines.

I. General Elections

Nominations. Previous to 1889 the state administration had nothing to do in connection with nominations to office. A statute of that year requires that nominations to state offices and to offices of any division greater than a county be made by filing the nomination papers of the candidate with the secretary of state, and directs the secretary to certify the nominations to the county clerks before the election.[1] Under the system of direct nomination the functions of the state administration in primary elections are similar to those performed in general elections.[2]

In case of a division in any party and a claim by two or more factions to the same party name, the secretary, in certifying nominations, is expressly required by a law of 1891 to give preference to the convention held pursuant to the call of the regular constituted party authorities, and to give a name to the other faction if the latter presents no party name. When two or more conventions are held, each claiming to be the regular party convention, preference must be given to the nominations of the one certified by the committee which has been officially declared

[1] *Laws*, 1889, ch. 248, secs. 7, 10, 12; *Revised Statutes*, 1898, secs. 32-4.
[2] *Laws*, 1903, ch. 451, secs. 4 (1, 5), 6 (1), 7, 16 (3), 17-19; *Laws*, 1907, st. 11 (4, 6-7, 16-7, 19, 27), 87m.

as authorized to represent the party.[3] The secretary of state thus has no discretion in the matter.[4]

Notice of Elections. Notice of general elections has always been given by the secretary of state, at first to the sheriff, and later to the county clerk—at present for state officers, supreme, circuit, and county judges, members of the legislature, representatives in congress, and presidential electors.[5] Notice of questions submitted to the vote of the people of the state is given in the same manner.[6]

Election Returns. During the territorial period the county clerk transmitted copies of the abstract of votes at the election to the secretary of the territory alone,[7] but since 1848 copies have been sent to the governor, secretary of state, and state treasurer.[8] Should no statement be received within the period prescribed by law, the secretary is authorized to send a special messenger for such statements,[9] and in case of delay in the receipt of the statement of the votes for presidential electors the governor is authorized to send a messenger to obtain the same.[10]

The State Canvass: The Board of State Canvassers. (1) *The Organization of the Board.* The territorial canvass (for

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[3] *Laws*, 1891, ch. 379, sec. 8; *Revised Statutes*, 1898, sec. 35.

[4] *State v. Houser*, 122 *Wis.* 534 (1904). *Cf. Wisconsin State Journal*, Oct. 5, 1904. The accounts of the campaign expenses of candidates for those offices for which the certificates of election are issued by the secretary of state must be filed with the secretary. *Laws*, 1897, ch. 358, sec. 6; *Revised Statutes*, 1898, sec. 4543c; *Laws*, 1905, ch. 502.

[5] *Laws*, June, 1848, p. 191, tit. 3, sec. 1; *Revised Statutes*, 1849, ch. 6, secs. 10, 12; *Laws*, 1883, ch. 327, sec. 1; *Laws*, 1907, st. 20; *Laws*, June, 1848, p. 19, sec. 1; *Laws*, 1852, ch. 395, sec. 1; *Laws*, 1854, ch. 36, sec. 1; *Laws*, 1899, ch. 47.

Notices of vacancies to be filled at a general election are given by the secretary of state in the same manner. *Laws*, June, 1848, p. 191, tit. 3, sec. 2; *Revised Statutes*, 1849, ch. 6 sec. 11; *Revised Statutes*, 1898, sec. 941.

The secretary's duty in giving out notices of elections is purely ministerial, and may be controlled by *mandamus* or injunction. *State v. Cunningham*, 81 *Wis.* 440 (1892).

[6] *Laws*, 1889, ch. 248, sec. 30; *Revised Statutes*, 1898, sec. 58.

[7] *Laws*, 1837-8, No. 69, sec. 17.

[8] *Laws*, June, 1848, p. 191, tit. 4,[2] sec. 8; *Revised Statutes*, 1898, sec. 87.

[9] *Laws*, 1837-8, No. 69, sec. 18; *Laws*, June. 1848, p. 191, tit. 4,[3] sec. 11; *Revised Statutes*, 1898, sec. 94. *Cf. State v. State Canvassers*, 36 *Wis.* 498 (1874). See also *Laws*, 1864, ch. 322; *Annotated Statutes*, sec. 59 and note; *Revised Statutes*, 1898, sec. 94.

[10] *Revised Statutes*, 1849, ch. 6, sec. 78; *Revised Statutes*, 1898, sec. 94c.

delegate in congress) was conducted by the secretary of the territory, strangely enough, "with the marshal of the territory, or his deputy, in the presence of the governor."[11] Since 1848 the board has consisted of the secretary of state, state treasurer, and attorney general.[12] Should only one member of the board be present on the day appointed for the canvass, the clerk of the supreme court, upon notice by the member present, attends with him, and they two form the board.[13] A law of 1876 provides that when any member of the board is a candidate for an office for which the votes are canvassed by the board, the chief justice of the supreme court shall designate a judge of the circuit court to act in place of the candidate,[14] but under a statute passed four years later this procedure is not necessary unless demanded by the opposing candidate, and the chief justice may appoint either a judge of the circuit court or a state officer.[15]

(2) *The Canvass.* For the canvass of votes for state officers, judges of the circuit and supreme courts, representatives (until 1848, delegate) in congress, presidential electors, and questions submitted to the people of the state, the secretary of state calls meetings of the board within the periods prescribed by law. Upon the basis of the statements of votes received from the county clerks, the board determines the results of the election and certifies the determination to the secretary of state, who records and publishes the same, and sends a copy of the certificate to the person elected.[16]

In 1856, in the case of *Attorney General v. Barstow*,[17] the supreme court held that the board was not authorized under the law to receive additional or supplemental returns from the

[11] *Laws*, 1837–8, No. 69, sec. 17.

[12] *Laws*, June, 1848, p. 191, tit. 4², sec. 13; *Revised Statutes*, 1898, sec. 93. *Cf. Laws*, June, 1848, p. 19, sec. 2; *Laws*, 1854, ch. 36, sec. 9.

[13] *Revised Statutes*, 1849, ch. 6, sec. 69; *Revised Statutes*, 1898, sec. 93.

[14] *Laws*, 1876, ch. 246. See *Governor's Message*, 1876, p. 9.

[15] *Laws*, 1880, ch. 318, sec. 1; *Revised Statutes*, 1898, sec. 93. See *Wisconsin State Journal*, Dec. 6, 1879.

[16] *Laws*, 1837–8, No. 69, sec. 17; *Laws*, June, 1848, p. 19, sec. 1; p. 191, tit. 4², secs. 12–5; *Revised Statutes*, 1849, ch. 6, secs. 72, 79–83; *Laws*, 1852, ch. 395, sec. 1; *Revised Statutes*, 1878, secs. 70–1, 89; *Revised Statutes*, 1898, secs. 94a–d; *Laws*, 1899, ch. 47.

[17] 4 *Wis.* 567 (1856).

local authorities, but must determine the result of the election from the regular certified statements of the county canvassers alone, and could use no other evidence whatever; and this opinion was embodied in a statute of 1858.[18] In rendering a decision later to the same effect in *State v. State Canvassers*,[19] the court suggested that the tabular statements of the votes by towns and wards, the use of which by the board were then unauthorized, should be required by law to be returned to the board, and the board empowered to enforce the correction of returns which were manifestly erroneous. The *Revised Statutes* of 1878 follow this advice, requiring the tabular statements from the county commissioners, and authorizing the board to send for corrected returns.[20]

II. Special Elections

The law of 1848 directs that special elections for state officers and presidential electors, made necessary on account of an equality of votes, shall be ordered by the board of state canvassers, and that all other special elections for such offices and all other special elections except those for local offices vacant on account of an equality of votes, which are to be ordered by the local canvassers, shall be ordered by the governor.[21] Since 1849 all special elections for county officers have been ordered by the local authorities, and all other special elections by the governor.[22] The governor has always ordered special elections to fill vacancies in the legislature.[23] All of these orders are de-

[18] *Laws*, 1858, ch. 78; *Revised Statutes*, 1898, secs. 94e, 4544.

[19] 36 *Wis.* 498, 509 (1874). *Cf. Governor's Message*, 1877, pp. 17-8.

[20] *Revised Statutes*, 1878, secs. 48, 62. 71; *Annotated Statutes*, sec. 48, note; *Revised Statutes*, 1898, secs. 83, 94a, 94d.

[21] *Laws, June*, 1848, p. 191, tit. 2, secs. 3, 7; tit. 3, secs. 5, 6; p. 19, sec. 2. From 1838 to 1848 in case of a tie vote for a local office, the election was decided by lot. *Laws*, 1837-8, No. 69, sec. 16.

[22] *Revised Statutes*, 1849, ch. 6, sec. 14; *Revised Statutes*, 1898, sec. 94n.

[23] *Laws*, 1837-8, No. 69, sec. 24; *Constitution*, Art. IV, sec. 14. For discussion in regard to the circumstances under which the governor may take official notice of a vacancy, see *Wisconsin State Journal*, Oct. 24, 1870; *Senate Journal*, 1871, p. 97; *Madison Democrat*, Aug. 18, 1894; *Wisconsin State Journal*, Aug. 23, 1894.

livered by the secretary of state to the county clerk, formerly to the sheriff.[24] Special elections are conducted, and the result canvassed and certified in the same manner as in general elections.[25]

III. Contested Elections

The law does not directly bring the state administration into contact with contested elections further than the requirement of a statute of 1873 for the filing of the notice of a contested seat in the legislature in the office of the secretary of state.[26] It seems generally to have been the custom of the secretary of state to make up a list of the members elect of the legislature for the use of that body, but the legality of this practice so far as it pertains to contested seats has been questioned. In 1887, when there was a contested seat, the secretary referred the question of making up the list to the attorney general. It was the opinion of the latter that although there was then no statute authorizing the making up of such lists, it was a convenient and harmless procedure as long as no contest arose, but that in such a case it was "unwise" for the secretary "to attempt to decide the question," which would be an infringement of the authority of the house to determine its own membership, "both as to the *prima facie* right to a seat, under the certificates presented, and also as to which of the contestants is entitled to retain his seat in that body." He therefore advised the secretary to certify the names only of those members whose rights were not disputed.[27] But, by later practice, the secretary has certified all names as they come from the canvassers, without regard to any notice of a contest filed in his office. This practice is recognized in a statute of 1905, which requires the secretary, previous to each regular session of the legislature, to make a list of the members

[24] *Laws*, June, 1848, p. 191, tit. 3, sec. 3; *Revised Statutes*, 1898, sec. 94o.
[25] *Revised Statutes*, 1849, ch. 6, sec. 6; *Revised Statutes*, 1898, sec. 94p.
[26] *Laws*, 1873, ch. 191; *Revised Statutes*, sec. 104.
[27] *Wisconsin State Journal*, Jan. 11, 12, 1887; *Madison Democrat*, Jan. 13, 1887.

elect of the next legislature and forward a copy to each of the members.[28]

In 1880 the supreme court was given by statute important powers in reference to the canvass in certain cases of contested elections. In *Attorney General v. Barstow*[29] the court had declared that the board are mere ministerial officers and not a judicial tribunal whose "determination" is final; that their certificate is only *prima facie* evidence of the truth of the assertions made therein and the court will go behind the certificate in *quo warranto* proceedings to determine the fact of election. But in cases in which officers are not subject to be ousted by *quo warranto,* the court had then no power to go back of the returns. This was made apparent by the opinion in *State v. State Canvassers,*[30] in which it was held that in a proper case the court would by *mandamus* require the board to determine which one of the candidates for the office of representative in congress was entitled to the certificate of election; but the court refused to go behind the returns and correct frauds and mistakes and determine the right to the office, on the ground that the power to make such determination is vested exclusively in the house of representatives.[31] The object of the law of 1880 was to enable the court to go back of the certificate in all cases which could not thus be reached by *quo warranto* proceedings.[32] This law provides that in any proceeding by *mandamus* against any board of canvassers in the supreme court to compel the execution and delivery of a certificate of election to any person claiming to have been elected as member of the legislature or of the house of representatives or as a presidential elector (the latter two offices alone come under the jurisdiction of the board), the court may, "if it is deemed necessary to promote the ends of justice," inquire into the facts of the election irrespectively of the election returns, and determine who is in fact entitled to the certificate of election. The certificate issued in pursuance of such determination

[28] *Laws*, 1905, ch. 480, sec. 3.
[29] 4 *Wis.* 567 (1856).
[30] 36 *Wis.* 498 (1874).
[31] *Cf. Laws*, 1876, Mem., No. 13.
[32] *Wisconsin State Journal*, Jan. 28, 1880.

must be taken as the true and lawful certificate of election.[33] But of course there is here no attempt to limit the final authority of the house of representatives in passing upon the qualifications of its own members.[34] The immediate occasion of the enactment of the law was the recent conflicts in the legislatures of other states and especially the contest between the rival legislatures in Maine in the winter of 1879–80.[35]

IV. Voting Machines

The Wisconsin voting machine commission consists of three members, two of whom must be "mechanical experts," and not more than two, members of the same political party. None of them may have any pecuniary interest in any voting machine. They are appointed by the governor for a term of five years. Their compensation consists in fees paid by applicants for the examination of voting machines submitted for the approval of the commissioners. The commissioners make public examinations of such machines and determine whether they satisfy the requirements of the law, and report the results of the examination to the secretary of state. Only such makes of machines as have been approved by the commissioners may be adopted by the localities.[36]

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[33] *Laws,* 1880, ch. 231; *Revised Statutes,* 1898, sec. 3452.

[34] *Milwaukee Sentinel,* Feb. 10, 19, 1880; *Wisconsin State Journal,* Feb. 13, 17, 1880; *Senate Journal,* 1880, pp. 185–8, 207–13.

[35] *Madison Daily Democrat,* Jan. 23, 1880; *Wisconsin State Journal,* Jan. 28, Feb. 4, 13, 1880; *Assembly Journal,* 1880, p. 42.

[36] *Laws,* 1901, ch. 459, secs. 1–2, 4; *Laws,* 1905, ch. 495, sec. 1.

CHAPTER X

THE PUBLICATION OF STATE DOCUMENTS

I. The Commissioners of Public Printing. II. The Printing of State Documents. III. The Custody, Distribution, and Sale of State Documents

I. The Commissioners of Public Printing

During the territorial period public printing was generally assigned at each session of the legislative assembly by joint resolutions and resolutions of each house. In 1845 a general law provided for the annual appointment of a printer by the assembly, his term beginning at the close of the session. Such printers usually had in charge the printing only of the laws, journals, etc., the incidental printing being still assigned by the respective houses. Sometimes the compensation of the printer was named in the resolution making the appointment, and at other times determined by the assembly after the printing had been done[1].

The general lack of supervision and the loose methods of compensation led to many abuses[2]. This was apparently the cause of the provision embodied in the constitution of 1848 directing that all printing authorized by the legislature shall be let by contract to the lowest bidder.[3] But according to an early opinion of the supreme court in *Sholes v. State*, the legislature is limited to such a method only in cases of "mere mechanical

[1] *E. g. Laws*, 1836, p. 81; *Laws*, 1839–40, Res. No. 10; *Laws*, 1845, p. 7.
[2] *E. g., House Journal*, 1840–1, pp. 74–5; *House Journal*, 1842–3, pp. 81–2.
[3] *Constitution*, Art. IV, sec. 25.
[4] 2 *Pinney* 499 (1850). See also *Wisconsin Express*, Jan. 22, Feb. 12, 1850; *Senate Journal*, 1850, pp. 477–94, 1327–9; *Senate Journal*, 1858, pp. 861–4, 1325–34.

printing,'' and is free to adopt other methods in the printing of statutes, etc.

For the first ten years following 1848 the public printing was for the most part under the control of the secretary of state.[5] In 1858 the governor, secretary of state, and state treasurer were constituted commissioners of public printing,[6] but two years later the attorney general was substituted for the treasurer.[7] Since 1874 the commission has been composed of the secretary of state, state treasurer, and attorney general.[8] In view of the great amount of state printing and the improbability that any of these elective commissioners will have any practical knowledge of the business, the governor recommended in 1901 that an experienced printer should be secured to take charge of the state printing[9], but this has not been done. Since 1874 the commissioners have been required to make reports to the governor.[10]

II. The Printing of State Documents

The contract system includes all printing done under the authority of the state except in the occasional publications such as the revised statutes, and the publications in newspapers. All such contract printing is now under the control of the commissioners of public printing. Under the system of bidding as it was until 1858 there might be several independent state printers,[11] but since that time the whole of the printing has been awarded to one printer,[12] except that there is now a special contractor for the printing of the supreme court reports under provisions similar to those governing the other printing.[13] The term

[5] *Laws*, June, 1848, p. 177.
[6] *Laws*, 1858, ch. 114, sec. 1.
[7] *Laws*, 1860, ch. 315, sec. 1.
[8] *Laws*, 1874, ch. 243, sec. 1; *Revised Statutes*, 1898, sec. 296.
[9] *Senate Journal*, 1901, p. 51.
[10] *Laws*, 1874, ch. 32, sec. 4; *Revised Statutes*, 1898, sec. 335.
[11] *Laws*, June, 1848, p. 177, sec. 2.
[12] *Laws*, 1858, ch. 114; *Revised Statutes*, 1898, sec. 297 ff.
[13] *Laws*, 1878, ch. 124, *Revised Statutes*, secs. 346-7e. No permanent provision was made for the publication of the reports until 1849. From that time to 1878, they were published by the reporter of the court, and the state subscribed for a certain number of copies. *Revised Statutes*, 1849, ch. 22; *Laws*, 1861, ch. 198.

of the contract has generally been two years.[14] The amount of bond has been determined by law, and the sureties approved by the governor, and later by the commissioners.[15]

For a part of the period when the secretary of state awarded the contract, an appeal might be taken by bidders aggrieved by the secretary's action to a board consisting of the governor, state treasurer, and attorney general, and during the whole period the presence of one or more of these officers at the opening of the bids was required.[16] From 1848 to 1873 the contract might be annulled by the legislature when not properly performed, and during part of the period a board composed of the governor, secretary of state, and state treasurer had the same power during the recess of the legislature.[17] Since 1873 the commissioners alone have been vested with such authority.[18] The supervision of the printing even since the establishment of the commission has been left largely to the secretary, who is required by the law of 1874 to examine all work of the printer and see that the printing is properly done, and to examine and correct all accounts of the printer.[19] An additional control has been exercised by the legislature since 1848 through a joint committee on printing appointed by the legislature at the beginning of every session, with power generally to investigate all matters relating to printing.[20]

Since 1874 the paper used for the state printing has been contracted for under provisions of law similar to those regulating the contracts for printing.[21]

For the most part the statutes have determined by extremely

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[14] *Laws*, June, 1848, p. 177, secs. 1, 6; *Laws*, 1852, ch. 504, secs. 1, 8; *Laws*, 1858, ch. 114, sec. 8; *Laws*, 1860, ch. 315, sec. 2; *Revised Statutes*, 1898, sec. 297.

[15] *Laws*, June, 1848, p. 177, sec. 2; *Laws*, 1860, ch. 315, sec. 5; *Revised Statutes*, 1898, sec. 302.

[16] *Laws*, June, 1848, p. 177, sec. 2; *Laws*, 1852, ch. 504, secs. 7, 25.

[17] *Laws*, June, 1848, p. 177, sec. 4; *Laws*, 1852, ch. 504, sec. 23.

[18] *Laws*, 1873, ch. 290, sec. 10; *Revised Statutes*, 1898, sec. 304.

[19] *Laws*, 1840–1, No. 28, sec. 2; *Laws*, 1873, ch. 290, sec. 18; *Laws*, 1874, ch. 243, secs. 21, 23; *Revised Statutes*, 1898, secs. 326, 328–9.

[20] *Laws*, June, 1848, p. 177, sec. 3; *Laws*, 1852, ch. 504, secs. 21–2; *Laws*, 1858, ch. 114, sec. 23; *Revised Statutes*, 1898, sec. 106 (2).

[21] *Laws*, 1874, ch. 230, secs. 1, 5–9; ch. 243, sec. 25; *Revised Statutes*, 1898, secs. 305, 308–13; *Laws*, 1899, ch. 351, sec. 7.

detailed provisions what documents are to be printed, their size, number, etc., etc., but the printing is subject in some cases to the order of various authorities. Thus a law of 1858, merely recognizing the previous practice, directs that the incidental printing of the legislature shall be subject to the order of the respective houses, and that of the several state departments to the order of their respective officers;[22] and the printing of various documents is subject to the approval of the governor, the commissioners, or some other authority.[23]

The laws have always been prepared for publication by the secretary of the territory or the secretary of state,[24] and the secretary certifies to the correctness of the published laws.[25] The chief clerks of the respective houses of the legislature prepare the journals, etc., for publication.[26] Since 1874 the commissioners of public printing have had large discretion in preparing for publication the reports of the various state officers. They are authorized to strike from the reports the parts "not actually necesssary" for the information of the public, but this power is checked by a requirement that the rejected matter shall be filed and shall be open to public inspection.[27] The reporter of the supreme court prepares for publication the decisions selected by the court, and supervises the printing by the special contractor.[28] The various revisions of the statutes have been published under special arrangements in each case by persons appointed for the purpose by the legislature, the governor, the

[22] *Laws*, 1858, ch. 114, sec. 12; *Revised Statutes*, 1898, sec. 314.

[23] *E. g.*, *Laws*, 1857, ch. 80; *Laws*, 1866, ch. 135, sec. 1; *Laws*, 1874, ch. 243; *Revised Statutes*, 1898, sec. 340.

[24] *Laws*, 1836, No. 42; *Act of Congress*, Aug. 29, 1842, ch. 259, sec. 1, 5 *Stat. L.* 540; *Laws*, 1840–1, No. 28, secs. 1–2; *Laws*, June 1848, p. 115, sec. 6; *Revised Statutes*, 1898, sec. 143. See *House Journal*, 1840–1, appendix, p. 92.

[25] *Laws*, 1840–1, No. 28, sec. 2; *Revised Statutes*, 1898, sec. 320. See also *Laws*, 1864, ch. 411, sec. 2; *Revised Statutes*, 1898, sec. 343. *Cf. State v. Wendler*, 94 Wis. 369, 373 (1896). From 1883 to 1907 the secretary was assisted by the attorney general in indexing the session laws. *Laws*, 1883, ch. 51; *Laws*, 1907, ch. 550, sec. 2.

[26] *Laws*, 1836, No. 42, p. 80; *Laws*, June, 1848, p. 177, sec. 5; *Revised Statutes*, 1898, sec. 315.

[27] *Laws*, 1874, ch. 32, secs. 2–3; *Revised Statutes*, 1898, sec. 333.

[28] *Laws*, 1878, ch. 124, secs. 2–3; *Revised Statutes*, 1898, secs. 347a–b.

supreme court, or by the revisers.[29] In the publication of the laws in the newspapers the administration has had little discretion, this matter being for the most part regulated by law; but the publication has generally been under the supervision of the secretary of state.[30]

III. The Custody, Distribution, and Sale of State Documents

Up to 1873 there was no general uniform method provided for the custody and distribution of state documents, but the duties in this regard were usually divided unsystematically between the secretary of the territory or secretary of state and the superintendent of public property.

Since 1873 all public documents have been delivered by the state printer to the superintendent of public property (after 1874, through the secretary of state), and the superintendent has distributed in the first instance all documents according to law.[31] Until 1870 such sale of documents as was provided for was in charge of the librarian or superintendent of public property, though after 1858 under the direction of the trustees of the state library.[32] Next the secretary of state conducted the sale of all public documents,[33] but the matter was finally put in charge of the superintendent of public property in 1873.[34]

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[29] *Statutes*, 1839, p. 33; *Laws*, 1849, ch. 114; *Laws*, 1858, ch. 154; *Laws*, June, 1878, ch. 3; *Laws*, 1897, ch. 379.

[30] *Laws*, 1840-1, No. 28, sec. 2; *Laws*, 1873, ch. 290, sec. 18; *Revised Statutes*, 1898, sec. 329.

[31] *Laws*, 1873, ch. 290, sec. 41; *Laws*, 1874, ch. 243, sec. 42; *Revised Statutes*, 1898, sec. 348.

[32] *E. g.*, *Statutes*, 1839, p. 33, sec. 13; *Laws*, 1858, ch. 135, sec. 4.

[33] *Laws*, 1870, ch. 65.

[34] *Laws*, 1873, ch. 290, sec. 52; *Revised Statutes*, 1898, sec. 360. The distribution of copies of current legislative bills, etc., is in charge of the clerks of the respective houses, and the sale of such documents is conducted by the secretary of state through these clerks. *Laws*, 1907, sts. 111m. 111o.

CHAPTER XI

THE CIVIL SERVICE COMMISSION

I. The Organization of the Commission. II. The Functions of the Commission.—The State Civil Service.

I. The Organization of the Commission

The most recently established department of the state administration with which we are here concerned, and the last to be discussed, is the civil service commission created by a statute of 1905. The merit system had already been applied to the larger cities of the state by legislation beginning in 1895.[1] The extension of the reform came about without any considerable agitation on the subject.[2] The provisions of the law are based, with important modifications, upon the civil service laws especially of the United States, Massachusetts, and New York.[3]

The three civil service commissioners are appointed by the governor and senate for the term of six years, one commissioner retiring every two years. None of the commissioners may hold any other "lucrative administrative office" under the United States or the state. They are compensated according to the time devoted to their official duties. A few subordinate positions to be filled by the commission are provided for and their salaries fixed by law, but additional clerks and examiners may be appointed within certain limits.[4]

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[1] *Laws*, 1895, ch. 313. *Cf. Report of Civil Service Commission*, 1906, pp. 3–4.

[2] *Cf. Governor's Message*, 1905, pp. 75–8; *Wisconsin State Journal*, Dec. 23, 1904, June 24, 1905; *Report of Civil Service Commission*, 1906, p. 6.

[3] *Wisconsin State Journal*, Dec. 23, 1904, June 24, 1905; *Report of Civil Service Commission*, 1906, pp. 6–7.

[4] *Laws*, 1905, ch. 363, secs. 3–4; *Laws*, 1907, st. 990 (4–5).

II. The Functions of the Commission.—The State Civil Service

The commissioners are required to prescribe and enforce rules and regulations[5] for carrying into effect the provisions of the civil service law, but all rules are subject to the approval of the governor.[6] They are authorized to investigate the conduct of any person in the public service relative to the enforcement of the civil service law and the rules of the commission, and in making such investigations they may require the presence of witnesses, the production of records, etc. They make a biennial report to the governor.[7]

The scope of the civil service law is wide, and to the extent that it includes certain legislative positions it is believed to be unique.[8] The state "civil service," comprising "all offices and positions of trust or employment, including mechanics, artisans and laborers, in the service of the state, except offices and positions in the militia,[9]" is divided into two classes. The "unclassified service" comprises all officers elected by the the people, all officers and employes appointed by the governor alone, or by the governor with the consent of the senate, all officers and employes in the department of banking,[10] all presidents, teachers, etc. of all state educational institutions, the staff of state libraries, the heads of the state charitable and penal institutions, all persons appointed by name in any statute, and all

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[5] *Cf. Report of Attorney General,* 1906, pp. 806–7.

[6] If the governor takes no action on a rule or amendment submitted, it becomes effective without his approval after ten days.

[7] *Laws,* 1905, ch. 363, secs. 7, 9.

[8] *Report of Civil Service Commission,* 1906, pp. 5–6; *Governor's Message,* 1907, p. 42.

[9] *Laws,* 1905, ch. 363, sec. 1 (2). A merit system was adopted also for the militia by an act of the same year. *Laws,* 1905, ch. 434.

[10] The law specifies "any department for the creation of which a vote of two-thirds of all the members elected to each house is required," but there is no such department except the department of banking. *Constitution,* Art. XI, sec. 4. *Cf. Report of Attorney General,* 1906, pp. 649–52. *State v. Sparling,* 129 Wis. 164 (1906).

legislatve officers. All other positions belong to the "classified service."[11]

The classified service, except the positions in the state charitable and penal institutions, is again divided into four classes, known respectively as the exempt class, the competitive class, the non-competitive class, and the labor class.[12]

The classification of the service in the state charitable and penal institutions is made by the heads of the respective institutions with the approval of the state board of control, "conforming as near as may be to the spirit and purpose" of the civil service law in general.[13] Moreover these institutions are for the most part otherwise exempt from the operation of the civil service law.[14]

The statute includes in the exempt class only a few positions—one deputy or assistant for each principal executive officer, and the chief clerk or secretary of any board, one stenographer for each appointing officer or board, and the employes of the supreme court; but, subject to various limitations, the commissioners are authorized to include other positions in this class when they consider an examination to be, for special reasons, impracticable.[15]

The competitive class includes all positions not in any of the other three classes.[16] But when there are no eligibles in this

[11] *Laws*, 1905, ch. 363, sec. 8. See also *Report of Attorney General*, 1906, pp. 407-8, 477-8, 558-61, 643-4, 693.

[12] *Laws*, 1905, ch. 363, secs. 12, 15.

[13] *Laws*, 1905, ch. 363, sec. 13. See also *Report of Civil Service Commission*, 1906, p. 8; *Report of Attorney General*, 1900, pp. 547-9.

[14] *Laws*, 1905, ch. 363, sec. 13.

[15] *Laws*, 1905, ch. 363, sec. 14. See also *Report of Attorney General*, 1906, pp. 545-6, 666-7. Since the statute requires that all exemptions shall be published in the rules and that the rules shall be subject to the governor's approval, it would seem to follow that no transfers of positions to the exempt class may be made without the governor's approval. *Cf. Report of Attorney General*, 1906, pp. 547-9.

[16] It was doubtless the intention of the legislature in 1905 to include in the competitive class all legislative positions of a clerical nature, but on account of a conflict in the provisions of the statutes, it was held that only employees doing type-writing were so included. *Laws*, 1905, ch. 363, sec. 12; ch. 515, sec. 1; *Report of Attorney General*, 1906, pp. 501-2; *Report of Civil Service Commission*, 1906, pp. 5-6. By the law of 1907 all of the subordinate clerks and all subordinates of the sergeants at arms of both houses are appointed from the list of eligibles furnished by the commission. *Laws*, 1907, sts. 111a-g.

class for a particular position, a provisional appointment may be made for a limited period based upon a non-competitive examination, and in an emergency an appointment may be made for a few days without reference to the civil service provisions. Moreover when exceptional qualifications of a scientific character are required for a given position and a competitive examination does not seem practicable, the commission may suspend the competitive requirement, and in urgent cases appointments to temporary positions may be made without reference to standing on the list. Various restrictions guard against abuse in all such exceptional action.[17]

The labor class includes ordinary unskilled laborers.[18]

"All examinations for positions in the classified service shall be practical in character, and shall relate to those matters which will fairly test the capacity and fitness of the persons examined to discharge the duties of the office or employment sought by them, giving due allowance for experience in the same or similar positions. . . . Examinations of a technical or special character, or where requirements are peculiarly within the knowledge of the office, institution or department in which appointment is to be made, shall be proposed by the incumbent of such office or head of such institution or department, or by persons having knowledge and experience in the same or similar employments." Otherwise the commissioners are left entirely to their discretion as to the character of the examinations. The commissioners may refuse to examine or to certify an applicant if found lacking in any of the preliminary requirements established by the commission for a particular position, or if guilty of previous misconduct. In order to secure a proper distribution of appointments, the examinations, at first conducted in each of the assembly districts, are now held in each county.[19] Non-competitive examinations are given only to persons nominated by the proper appointing officer.[20] The term of eligibility of applicants which,

[17] *Laws*, 1905, ch. 363, secs. 15, 17.
[18] *Laws*, 1905, ch. 363, sec. 21.
[19] *Laws*, 1905, ch. 363, secs. 10–11; *Laws*, 1907, st. 990 (10).
[20] *Civil Service Rules*, No. IV.

by statute, may be fixed for each list at not less than one nor more than three years, has been fixed by the commission at one year in all cases.[21] In the labor class registration in the localities under rules of the commission is substituted for examination.[22]

Appointments to positions in the competitive class which are not filled by promotion, re-instatement, transfer, or reduction, are made from among persons certified as eligible by the commission to the appointing officer upon notice of a vacancy. The commissioners certify from the register of eligibles appropriate for the group in which the position to be filled is classified the three names standing highest as determined by examination,[23] and the appointing officer then appoints on probation one of the persons so certified.[24] Appointments in the labor class are, under rules of the commission, made in a similar manner, but applicants of the same grade of qualifications are certified in order of date of registration.[25]

The law requires that vacancies in the competitive class shall be filled, as far as practicable, by promotions from similar positions of a lower grade, and that such promotions shall be based upon examination by the commission. Transfers from a position in one class to a position in another may be made only under the authority of the commission, which is subject to various restrictions of law.[26] In making appointments, promotions, and transfers, it is provided that merit alone shall be considered and that no inquiry shall be made concerning political or religious affiliations.[27]

Persons appointed to positions in any but the exempt class may not be removed, suspended for more than fifteen days, nor

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[21] *Laws*, 1905, ch. 363, sec. 15; *Civil Service Rules*, No. X.

[22] *Laws*, 1905, ch. 363, sec. 21; *Report of Civil Service Commission*, 1906, pp. 12–3.

[23] Except that, when practicable, other conditions being equal, the rules must provide for a preferance in favor of veterans of the Civil War.

[24] *Laws*, 1905, ch. 363, sec. 16. See also *Report of Civil Service Commission*, 1906, pp. 113–4.

[25] *Civil Service Rules*, No. XVII.

[26] *Laws*, 1905, ch. 363, secs. 18–19. See also *Report of Civil Service Commission*, 1906, pp. 110–1.

[27] *Laws*, 1905, ch. 363, secs. 16, 25–6.

reduced in pay or position, except for just cause, "which shall not be religious or political." In all cases of removal the appointing officer must give the subordinate the reasons for the removal and allow him to make an explanation, and a statement of the reasons asserted and the answer must be filed with the commission.[28] But for improper removal redress is to be had from the courts rather than from the commission.[29]

As a check upon the appointing officers, all appointments, removals, etc. in the classified service must be notified to the commissioners, who keep a roster of all employes; and, further, all pay-rolls in the classified service must be approved by the commission before they are presented to the auditor.[30]

So far, with some exceptions, the civil service law seems to have been well enforced.[31]

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[28] *Laws*, 1905, ch. 363, sec. 22.
[29] *Report of Civil Service Commission*, 1906, pp. 114–6.
[30] *Laws*, 1905, ch. 363, secs. 23–4.
[31] *Wisconsin State Journal*, Feb. 13, 19, Mar. 21, 1908.